

# **GUARANTEED MAXIMUM PRICE AGREEMENT**

## **HUNTERS POINT SHIPYARD**

**Construction for Block 50**

**BETWEEN**

**"OWNER"**

**HPSI Block 50, LLC c/o Lennar Urban  
One California Street, Suite 2700  
San Francisco, CA 94111**

**AND**

**"CONTRACTOR"**

**James E. Roberts-Obayashi Corp.  
20 Oak Court  
Danville, California 94526**

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**EXHIBIT LIST**  
**GUARANTEED MAXIMUM PRICE AGREEMENT AND GENERAL CONDITIONS**  
**BLOCK 50**

- EXHIBIT A Memorandum of Agreement for Hunters Point Shipyard Redevelopment Project between Lennar/BVHP and San Francisco Building & Construction Trades Council et al. dated March 24, 2008.
- EXHIBIT B Intentionally Omitted.
- EXHIBIT C Intentionally Omitted
- EXHIBIT D Index of Drawings, Plans, Specifications and other related Technical Documents.
- EXHIBIT D-1 Design/Build Work.
- EXHIBIT E Notice to Proceed.
- EXHIBIT F Construction Schedule.
- EXHIBIT F-1 Milestones.
- EXHIBIT G Schedule of Values.
- EXHIBIT G-1 Schedule of Labor Rates.
- EXHIBIT H Project Qualifications.
- EXHIBIT I Progress Payment.
- EXHIBIT J Hunters Point Shipyard – Block 50  
Retention Release Schedule.
- EXHIBIT K Project Closeout Forms.
- EXHIBIT L Intentionally Omitted.
- EXHIBIT M Intentionally Omitted.
- EXHIBIT N Deficiency Notice.
- EXHIBIT O Schedule of Key Personnel.
- EXHIBIT P Weather Delay.
- EXHIBIT Q OSHA.

- EXHIBIT R Material Safety Data Sheets.
- EXHIBIT S OCIP Addendum – Agreement between Owner and Contractor, General Liability Owner Controlled Insurance Program.
- EXHIBIT S-1 OCIP Addendum – Agreement between Contractor and Subcontractor, General Liability Owner Controlled Insurance Program.
- EXHIBIT S-2 California Civil Code 2782.95 (Wrap Up) Disclosures.
- EXHIBIT S-3 Risk Factor Tiers for General Liability Limits and Self-Insured Obligations.
- EXHIBIT T Quality Assurance.
- EXHIBIT U Substitution Request.
- EXHIBIT V Construction Contract Directive.
- EXHIBIT W Payroll Certification.
- EXHIBIT X Lien Indemnity.
- EXHIBIT Y The Storm Water Pollution Prevention Plan ("SWPPP").

## GUARANTEED MAXIMUM PRICE AGREEMENT

This GUARANTEED MAXIMUM PRICE AGREEMENT ("Agreement") is made as of June 6, 2013 ("Effective Date") between HPS1 Block 50, LLC ("Owner"), and James E. Roberts-Obayashi Corporation, a California corporation ("Contractor"), with respect to certain improvements to be constructed on Block 50 of the Hunters Point Shipyard in the City and County of San Francisco ("Project Site") for which the architect is Berger Detmer Ennis, Inc. ("Architect"). Owner and Contractor are individually referred to herein as "Party" and collectively, as "Parties", and the Parties agree as follows:

### ARTICLE 1 THE CONTRACT DOCUMENTS

**Section 1.1 The Contract Documents.** The "Contract Documents" consist of: (i) this Agreement; (ii) General Conditions of the Contract, (the "General Conditions"); (iii) Drawings; (iv) Specifications and Design Information contained in the Project Manual (collectively, the "Specifications"); (v) Memorandum of Agreement for Hunters Point Shipyard Redevelopment Project by and among HPS Development Co., LP (an affiliate of Owner and successor-in-interest to Lennar - BVHP, LLC, a California limited liability company) and San Francisco Building & Construction Trades Council et al., dated as of March 24, 2008, a copy of which is attached hereto as Exhibit A (as amended from time to time, the "PLA"); (vi) Vertical Disposition and Development Agreement (Hunters Point Shipyard, Phase I – Block 50) by and between the Successor Agency to Redevelopment Agency of the City and County of San Francisco, a public body, corporate, and politic, of the State of California ("Agency"), and HPS1 Block 50, LLC, (as amended from time to time, the "VDDA") a copy of which will be available to Contractor before the Date of Commencement, as defined below; (vii) all Plans for Parcel A for compliance with Article 31 of the San Francisco Health Code ("Article 31 Plans"); Naturally-Occurring Asbestos Dust Mitigation Plan, Parcel A' Phase I Development Hunters Point Shipyard, dated 9/2005 and revised 5/2009 approved by the Bay Area Air Quality Management District ("ADMP"); and Project Mitigation Monitoring and Reporting Plan ("Project MMRP"), which documents have been provided to Contractor prior to the Effective Date; (viii) Addenda issued prior to execution of this Agreement; (ix) fully executed Change Orders; (x) Construction Change Directives; (xi) Requests for Information, where reviewed and responded to by Architect or Owner's consultants; (xii) Schedule of Values; (xiii) Project Qualifications as agreed to by Contractor and Owner; (xiv) the Storm Water Pollution Prevention Plan and (xv) modifications issued after the execution and delivery of this Agreement, inclusive and all exhibits, attachments, addendum and riders to the documents in clauses (i) through (xv) all of which form the Contract between the Parties. Each of the Contract Documents is as fully a part of the Contract as if attached to this Agreement or repeated herein.

Section 1.2 Contractor acknowledges, agrees and represents that it has received and reviewed all of the Contract Documents, including but not limited to the PLA, Article 31 Plans, ADMP and the Project MMRP or shall do so, before the Date of Commencement.

  
\_\_\_\_\_  
Contractor's Initials

## ARTICLE 2 THE WORK OF THIS CONTRACT

Section 2.1 Execution of the Work. Contractor shall fully execute the Work described in the Contract Documents, except to the extent specifically indicated in the Contract Documents to be the responsibility of others. Contractor shall furnish all management services, construction, administration and supervision, and shall install and construct all work, labor, materials, systems, equipment, utilities and facilities, necessary to properly perform and complete, in a good, expeditious, and workmanlike manner, consistent with applicable industry standards and trade practices, all of the work indicated by and reasonably inferable from the Contract Documents, as well as all work required to design and complete the Design/Build Work, (if applicable) all to Owner's satisfaction and in strict accordance with (i) the requirements of any Governing Authority which must accept or approve the Work, (ii) the Contract Documents, inclusive of the Drawings and Specifications and (ii) the Applicable Laws, inclusive of the Uniform Building Code, (iii) the Building Standards set forth in California Civil Code section 895 et seq. In the event of any inconsistency between the Applicable Laws, on the one hand, and the description of the Work in the Contract Documents, on the other, the Applicable Laws shall govern.

Section 2.2 Compliance with Contract Documents, Green Building Standards. Contractor hereby acknowledges, agrees and understands that the Project is subject to certain applicable terms, conditions, covenants, and restrictions set forth in the Contract Documents, including but not limited to the PLA and the VDDA, and that in performing the Work it will strictly comply with the Contract Documents, including all indemnifications obligations in the Contract Documents. Contractor further acknowledges, agrees and understands that if the Contract Documents require that the development of the Project integrate and incorporate environmentally sustainable, or "green" techniques, methods, and materials, including but not limited to LEED standards, HERS Rating or GreenPoint Rating (collectively, "Green Building Standards"), the Green Building Standards are a material component of the Project. Contractor must achieve and strictly comply with the Green Building Standards in the performance of the Work.

  
\_\_\_\_\_  
Contractor's Initials

Section 2.3 Design/Build Work (to the extent the Work includes Design/Build Work).

Section 2.3.1 Contractor shall prepare and complete, as part of the Work, the design and construction documents for all Work designated in (i) Exhibit D-1 and (ii) the Specifications as performance specifications (collectively, "**Design/Build Work**"), in accordance with the provisions of the Contract Documents. Contractor shall coordinate, and shall cause its Subcontractors to coordinate the Design/Build Work with the design services of Architect and other consultants retained by Owner.

Section 2.3.2 Contractor will engage Subcontractors to furnish Owner with design documents suitable for construction, which may consist of drawings, specifications, and/or other documents and shall set forth in detail the requirements for construction of the Design/Build Work, shall provide information for the use of Contractor and Subcontractors on the Project; including all documents customarily required for Governing Authorities' approvals, and shall comply with all Applicable Laws, regulations, and permits for the Design/Build Work.

Section 2.3.3 All drawings, models, shop drawings, specifications and other documents (including computer tapes or disks containing the data necessary to reproduce such documents) prepared by Contractor and Subcontractors for the Design/Build Work on the Project are deemed to be "**Design/Build Documents**". Contractor's contracts with any Subcontractor performing Design/Build Work shall require such Subcontractor to transfer, convey, and assign all ownership, rights, title and property interest in the Design/Build Documents, including all common law, statutory and other reserved rights (including copyright) to Owner, provided that Subcontractor is paid.

Section 2.3.4 Contractor represents, warrants and covenants that the Design/Build Documents do not and will not infringe on any copyrights, trade secrets or other similar intellectual property rights of any third party. To the greatest extent permitted by law, Contractor further agrees to indemnify, defend and hold harmless Owner from and against any liability, damage, claim, cost or expense incurred or received as a result of the alleged infringement of a third party's rights in the Design/Build Documents.

Section 2.3.5 Owner and Owner's Affiliates may use the Design/Build Documents and related concepts, and any and all electronic methods of reproducing the Design/Build Documents and related concepts, without any further obligation or payment to Contractor in relation to such use. Owner agrees that any reuse of the Design/Build Documents on any other project other than Block 50 at Hunters Point Shipyard in the City and County of San Francisco (the "**City**"), will be at Owner's sole risk and without liability or legal exposure to Contractor or any Subcontractor performing Design/Build Work and Owner shall defend, indemnify and hold harmless such parties from any and all claims, damages, losses and expenses, including attorney's fees, arising out of or resulting from Owner's reuse of the Design/Build Documents.

**Section 2.3.6** The Design/Build Documents shall be (i) consistent, coordinated, and comply with all of the Drawings and Specifications prepared by Architect and Owner's consultants and other requirements in the Contract Documents; (ii) consistent with applicable industry standards and trade practices; and (iii) in compliance with all Applicable Laws, including all applicable building codes and California Civil Code section 895 et seq.

**Section 2.3.7** With respect to Contractor and any Subcontractor's performance of design and engineering services, Contractor and Subcontractors are required to meet the Standard of Care.

**Section 2.3.8** As requested by Owner, Contractor and its Subcontractors performing Design/Build Work shall meet and confer with Architect and/or Owner's consultants to review the in-progress Drawings and Specifications before such Drawings and Specifications are issued for construction. During such review, Contractor and Subcontractors shall cooperate with Owner, Architect and/or Owner's consultants to explore design alternatives, constructability and installation issues, material selection, system specifications, sequencing, phasing, locating, and other coordination issues.

**Section 2.3.9** Contractor will work together with Owner to ensure that all Subcontractors performing Design/Build Work shall be adequately insured providing both the Owner and Contractor against the risks associated with such design as set forth in Article 11 of the General Conditions.

## **ARTICLE 3 RELATIONSHIP OF THE PARTIES**

**Section 3.1** Contractor accepts the relationship of trust and confidence established by this Agreement and covenants with Owner to: (i) cooperate with Owner, Architect, Owner's consultants and any Inspectors of the Work; (ii) exercise Contractor's skill and judgment in furthering the interests of Owner; (iii) furnish efficient business administration and supervision; (iv) furnish at all times an adequate supply of workers and materials; and (v) execute the Work consistent with Owner's interests. Owner agrees to furnish and approve, in a timely manner, information required by Contractor and to make payments to Contractor in accordance with the provisions of the Contract.

## **ARTICLE 4 DATE OF COMMENCEMENT AND SUBSTANTIAL COMPLETION**

**Section 4.1** Date of Commencement. The "Date of Commencement" will be the date set forth in the Notice to Proceed issued by Owner in the form attached as Exhibit E. Upon receipt of such Notice to Proceed, Contractor shall promptly acknowledge and return an executed copy of such Notice to Proceed to Owner.



**Section 4.2 Date for Substantial Completion.** Contractor shall achieve Substantial Completion within Two hundred and Forty-Six (246) Business Days of the Date of Commencement, which is the **Contract Time**. Before Owner issues the Notice to Proceed, Owner shall advise Contractor of its intent to do so and Contractor shall revise the Construction Schedule to incorporate the Date of Commencement set forth in the Notice to Proceed. The Construction Schedule showing durations for each component of the execution of the Work and dates for Substantial Completion of each such component is attached hereto as **Exhibit F**. Contractor shall also provide Owner with a PDF version of the Construction Schedule in format, form and substance acceptable to Owner. The Construction Schedule shall reflect Contractor's scheduling information, including durations required pursuant to this Agreement and the General Conditions.

**Section 4.3 Early Substantial Completion.** Contractor is entitled to achieve Substantial Completion prior to the time set forth in **Section 4.2**.

## **ARTICLE 5 BASIS FOR PAYMENT**

**Section 5.1 Contract Sum.** The "**Contract Sum**" is the sum of the Cost of the Work (defined below) and the Contractor's Fee (defined below). The Contract Sum is set forth in the Schedule of Values attached as **Exhibit G** hereto. The Schedule of Values contains the Contract Sum, any Allowances, the GMP (defined below), and Contractor's itemization of its general condition expenses (both in the aggregate and by line item) consistent with this Agreement and the General Conditions and shall serve as the basis for any compensation for services rendered and goods supplied on a unit-priced basis. Unless specifically authorized in writing by Owner, no costs of Contractor incurred prior to the Commencement Date shall be included in the Cost of the Work. Only the costs explicitly identified in the Schedule of Values and which are consistent with those identified in **Section 5.3** shall be included in the Contract Sum.

**Section 5.2 Guaranteed Maximum Price.** **This Agreement is a guaranteed maximum price contract.** The Contract Sum is guaranteed by Contractor not to exceed the Guaranteed Maximum Price (the "GMP"), which is **Ten Million, One Hundred and Ninety-Seven Thousand and Sixty-Eight Dollars (\$10,197,068)** (as set forth in the Schedule of Values). Contractor is obligated to perform its obligations under the Contract Documents with total payments equal to or no greater than the GMP and Owner shall in no event be charged or liable for amounts in excess of the GMP. The GMP is subject to adjustments with Owner's consent and subject to additions and deductions by Change Order as provided in the General Conditions. If Contractor realizes savings in any line item of the Schedule of Values during Contractor's performance of the Work, then Contractor may reallocate any such line item savings to other Schedule of Values line items, provided, however, that such reallocation shall not increase the GMP. Costs and expenses which are in excess of the GMP shall be the sole and absolute responsibility of Contractor and Owner shall have no obligation to reimburse Contractor for such costs and expenses.

**Section 5.2.1** The GMP is based upon the Scope of Work required in order to execute the Work in strict accordance with the provisions of the Contract Documents, including but not limited to all Design/Build Work, provided Design/Build Work is a part of the Work.

**Section 5.2.2** The GMP has been calculated and the Contract Time established on the basis of the Contract Documents. In determining the GMP and Contract Time, Contractor has exercised its best skill and efforts to make (i) appropriate judgments and inferences in connection with the requirements of the Drawings and Specifications and (ii) all inquiries of Owner to clarify the Contract Documents as Contractor deemed necessary or desirable to calculate and establish both the GMP and the Contract Time. Contractor represents and warrants that the Contract Documents, all other materials and information furnished to Contractor as of the Effective Date of this Agreement and the ongoing discussions and meetings between Contractor and Owner, Architect and other consultants have described the scope of the Work, construction requirements and the Work in detail sufficient to enable Contractor to establish the GMP and the Contract Time. Contractor shall not be permitted to claim any adjustment in either the GMP or Contract Time except as specifically set forth herein and in the General Conditions.

**Section 5.3 Cost of the Work.** The "Cost of the Work" shall be the actual, permissible and reasonable out-of-pocket costs paid or incurred by Contractor in direct connection with the Work, less all discounts, rebates and salvages that shall be deducted from the Cost of the Work pursuant to Section 7.7. The Cost of the Work shall be at rates not higher than the standard paid at the place of the Project except with prior express consent of Owner.

**Section 5.3.1 Included Costs.** The Cost of the Work shall include and be limited by the following, each to the extent set forth in the Schedule of Values, to the extent not prohibited by the Agreement, and to the extent incurred in compliance with this Agreement :

**Section 5.3.1.1** Compensation paid for labor of direct employees of Contractor in the performance of the Work in the amounts and at rates identified in Exhibit G-1 hereto (the "Schedule of Labor Rates" which rates are burdened to include taxes, insurance, contributions, assessments and benefits required by law or collective bargaining agreement, and for personnel not covered by such agreements, customary benefits, such as sick leave, medical and health benefits, holidays, vacations and pensions);

**Section 5.3.1.2** Compensation paid to Contractor's employees when stationed at the field office in whatever capacity employed (in the amounts and at the rates identified in the Schedule of Labor Rates which are burdened to include taxes, insurance, contributions, assessments and benefits required by law or collective bargaining agreement, and for personnel not covered by such agreements, customary benefits, such as sick leave, medical and health benefits, holidays, vacations and pensions). Contractor's employees, including Contractor's project managers, superintendents, project engineers, compliance officers and project accountants shall be considered stationed at the field office regardless of their physical location and their

compensation shall be included in the Cost of the Work only for that portion of their time spent directly on the Work;

**Section 5.3.1.3** Expenses incurred pursuant to the Contract Documents by Contractor with respect to consultants, Subcontractors, Mechanics, Suppliers, and/or others retained by, through or under Contractor for the performance of the Work;

**Section 5.3.1.4** Costs, including transportation and maintenance and storage, of all materials, tools, supplies, equipment, temporary facilities (including heat, electrical power, water) and hand tools (not owned by Contractor or other workmen) which are consumed in the performance of the Work, as well as blueprints and scheduling;

**Section 5.3.1.5** Rental charges of all necessary machinery and equipment, exclusive of hand tools, used at the Project Site, whether rented from Contractor or others, including installation, minor repairs and replacements, dismantling, removal, transportation and delivery costs thereof. Unless otherwise previously approved in writing by Owner, the Cost of the Work shall not include rental charges in connection with any single piece of machinery or equipment to the extent that the cumulative total of such charges exceed of sixty percent (60%) of its fair market value as of the date that such machinery or equipment is first put into service in connection with the Work. Contractor shall pay any rental charges in excess of such limitations. The rental value of Contractor's own equipment shall not be more than the standard rates charged by construction equipment rental companies in the area where the Project is located, unless approved by Owner in advance and in writing. Notwithstanding the foregoing, Contractor shall analyze the anticipated aggregate rental cost versus purchase cost taking into the account the residual salvage value. Contractor shall then choose that option which results in the lowest cost that would be charged to the Project;

**Section 5.3.1.6** Cost of the Project Sign;

**Section 5.3.1.7** Expenses for compliance with OSHA Requirements (which rates shall be noted in the Schedules of Values);

**Section 5.3.1.8** Direct cost of premiums, including fees paid to Contractor's bond indemnitor, for all surety bonds and insurance (except for the insurance covered by the OCIP policy pursuant to Article 11 of the General Conditions), which Contractor is required to purchase and/or maintain pursuant to the Agreement and General Conditions. All premiums shall be noted in the Schedule of Values. However, none of the enumerated costs for surety bond premiums and indemnity fees, and insurance in this Section 5.3.1.8 shall be included in the Cost of the Work for purposes of calculating Contractor's Fee;

**Section 5.3.1.9** Sales, use or similar taxes related to the Work and for which Contractor is liable pursuant to Governmental Requirements;

**Section 5.3.1.10** Royalties and patent royalty fees;

**Section 5.3.1.11** Expenses for items such as long distance communications, telephone and cellular service at the Project Site, postage, express delivery charges, facsimiles, and copying, and outsourced computer usage of a specialized nature, petty cash items and for the expenses for gas, oil and routine maintenance of Contractor's work vehicles used for the transport of materials and supplies to the Project Site;

**Section 5.3.1.12** Cost of Project clean up;

**Section 5.3.1.13** Costs to remedy, repair or replace any defect or imperfection in the Work as set forth in the General Conditions, when the defect, imperfection, or damage is the result of parties other than Contractor, its Subcontractors, Suppliers, Mechanics or anyone under the control of Contractor and only to the extent that the cost of repair or correction is not recovered by Contractor from insurance, sureties, Subcontractors, Suppliers or other Mechanics and provided further that any absence of collectible insurance is not due to Contractor's breach of a contract for insurance required to be maintained by Contractor pursuant to this Agreement and the General Conditions. Notwithstanding the foregoing, Contractor must make reasonable efforts to recover such costs from the liable entity or person. This Section 5.3.1.13 does not apply to costs incurred for repairs made after Final Completion, acceptance or placement of the Work into service for its intended purpose, whichever is earliest.

**Section 5.3.1.14** Costs of a field office, tool sheds, portable restrooms, copiers, computer systems and maintenance thereof, for use by Contractor during the course of executing the Work;

**Section 5.3.1.15** Costs of all governmental fees, licenses and governmental inspections necessary for the proper execution and completion of the Work, provided that the costs for all inspections shall be borne and paid directly by Owner, except as disallowed in Section 5.3.2.5 and the General Conditions. However, none of these enumerated costs in this Section 5.3.1.15 shall be included in the Cost of the Work for purposes of calculating the Contractor's Fee.

**Section 5.3.1.16** Costs incurred in taking action to prevent threatened damage, injury or loss in case of an emergency affecting the safety of persons and property, as provided in Section 3.4.5 of the General Conditions;

**Section 5.3.1.17** Costs incurred for security for the Project Site;

**Section 5.3.1.18** Costs incurred for safety of persons and materials at the Project Site and in the performance of the Work;

**Section 5.3.1.19** Other costs to the extent such costs are approved and explicitly identified as a component of the Cost of the Work in writing by Owner prior to Contractor incurring such costs.

**Section 5.3.2 Excluded Costs.** The Cost of the Work shall not include any cost or expense not specifically permitted pursuant to the terms of this Agreement. Without limiting the generality of the foregoing, the Cost of the Work excludes the following:

**Section 5.3.2.1** Salaries or other compensation of Contractor's executives, general managers, estimators, attorneys, accountants, expeditors or auditors or other personnel at Contractor's principal office, branch offices or the Project Site, all of which will be considered administrative costs covered by Contractor's Fee;

**Section 5.3.2.2** Bonuses, profit sharing, incentive compensation and any other discretionary payments to anyone employed or hired by Contractor or paid to any Subcontractor, Mechanic, Supplier or vendor, without the Owner's prior approval;

**Section 5.3.2.3** Overhead, general and administrative expenses and expenses of Contractor's principal or branch offices (other than the field office at the Project Site to the extent provided in Section 5.3.1.14);

**Section 5.3.2.4** Any part of Contractor's capital expenses, including interest on Contractor's capital employed for the Work and charges against Contractor for delinquent payments;

**Section 5.3.2.5** Cost due to default or negligence of Contractor and any of its Subcontractors, Mechanics, or Suppliers, including, without limitation, any costs for third-party re-inspections excluded from the Cost of the Work pursuant to Section 14.1.7 of the General Conditions, any costs incurred as a result of any failure of the Design/Build Work (if applicable) to satisfy the requirements of the Contract Documents, any costs related to the correction of defective or nonconforming work, disposal of materials and equipment wrongly supplied, making good any damage to property, or costs associated with delays not authorized pursuant to Section 9.2 of the General Conditions;

**Section 5.3.2.6** Contractor's corporate, federal or state income tax liability;

**Section 5.3.2.7** Costs in excess of the GMP, as adjusted pursuant to the Agreement and the General Conditions;

**Section 5.3.2.8** All permit fees paid separately by Owner, including, without limitation, the building permit, impact fees and mechanical, electrical and plumbing permits, unless Owner requires Contractor to obtain any permits. However, none of the permit fees shall be included in the Cost of the Work for purposes of calculating the Contractor's Fee, regardless of which Party obtained the permits; and

**Section 5.3.2.9** Transportation, traveling, meal and lodging expenses of Contractor or its employees, unless approved by Owner in writing, before such expense is incurred.

**Section 5.4 Contractor's Fee.** The "Contractor's Fee" shall be a fixed fee equal to four percent (4.0%) of the Cost of the Work.

**Section 5.4.1** Contractor's Fee shall be reduced by 4% of the amount by which the Cost of Work is reduced where the Change Order, Construction Change Directive ("CCD") or combination of Change Orders and/or CCDs arising out of the same change in Work exceeds ten (10%) of the original GMP. Otherwise, Contractor's Fee shall not be reduced in connection with deductive Change Orders and CCDs.

**Section 5.5 Contract Savings Split.** Owner and Contractor agree to share any Contract Savings in the following ratio: fifty percent (50%) to Owner and fifty percent (50%) to Contractor.

**Section 5.6** The calculation of the Contract Savings shall occur after Final Completion and after all other Change Orders (other than the Final GMP Reconciliation Change Order) and extras have been fully performed. The result of the calculation shall be included in a final Change Order called a "Final GMP Reconciliation Change Order." Any Contract Savings due to Contractor shall be added to the Contractor's Fee. Components of the Work self-performed by Contractor, awarded after taking competitive bids for such components, shall be treated as any other subcontracted portion of the Work for purposes of calculating Contract Savings. "Contract Savings" means any amount by which the GMP, as adjusted pursuant to the requirements set forth in Article 8 of the General Conditions exceeds the Contract Sum, as adjusted.

**Section 5.7** Prior to Contractor's execution of this Agreement, Contractor shall deliver to Owner (i) a Schedule of Values by work division and in reasonable detail (ii) a Construction Schedule detailing relevant Milestone Dates as may be reasonably agreed with Owner, (iii) a list of Drawings, Specifications and other related documents (soils reports, etc.); and (iv) a list of qualifications, clarifications, assumptions, allowances and unit prices (including such narrative as may be required) and this list will be referred to as the "Project Qualifications." Each of the documents delineated in clauses (i) through (iv) shall be in format, form and substance reasonably satisfactory to Owner and include such data and documents as Owner may reasonably require. To the extent that Contractor's requested Project Qualifications include exceptions, exclusions and inclusions of Work set forth in the Contract Documents, Contractor must state the reason for the requested exception, exclusion, and inclusion, and provide an estimate and allowance for those exceptions, exclusions and inclusions. All Project Qualifications must be agreed to, in writing, before any Work commences. Contractor agrees that all work that is reasonably inferred from the Contract Documents, which has not been excepted or excluded in the Project Qualifications, is included in the Contract and GMP. The Project Qualifications shall be set forth in Exhibit H hereto. The Project Qualifications and any related exclusions to the Scope of Work shall only be modified in response to modifications to the Drawings and Specifications made after execution of this Agreement.

## **ARTICLE 6 CHANGES IN THE WORK**

**Section 6.1** Adjustments to the GMP on account of changes in the Work may be determined by any of the methods listed in Article 8 of the General Conditions.

**Section 6.2** In calculating adjustments to subcontracts (except those awarded with Owner's prior consent on the basis of cost plus fee), the terms "cost" and "costs" as used in Sections 8.2.5 and 8.2.6 of the General Conditions shall have the meanings assigned to them in General Conditions. Adjustments to subcontracts awarded with Owner's prior consent on the basis of cost plus a fee shall be calculated in accordance with the terms of those subcontracts, except that no adjustment to the subcontracts will include a total mark-up and profit above fifteen percent (15%) the cost of the labor and materials.

**Section 6.3** In calculating compensation for changes affecting costs incurred by Contractor, Subcontractors, Mechanics, or Suppliers (e.g., under Article 8 of General Conditions), compensable costs shall be subject to all restrictions on reimbursable costs in Article 5.

**Section 6.4** In calculating adjustments to the GMP, the terms "cost" and "costs" as used in the above-referenced provisions of the General Conditions shall mean the Cost of the Work as defined in Article 5 and the terms "fee" shall mean the Contractor's Fee as defined in Section 5.4.

## **ARTICLE 7 DISCOUNTS, REBATES, REFUNDS AND SALE OF SURPLUS MATERIALS**

**Section 7.1** Trade discounts, rebates, refunds and sale of surplus materials shall accrue to Owner and shall be deduction from the Cost of Work, except as provided pursuant to Section 7.8. Contractor shall make provisions so that trade discounts, rebates, refunds and the sale of unused materials can be obtained.

**Section 7.2** Cash Discounts. Cash discounts obtained on payments made by Contractor shall accrue to Owner if (1) before making the payment, Contractor included them in an Application for Payment and received payment therefore from Owner, or (2) Owner has deposited funds with Contractor with which to make payments; otherwise, cash discounts shall accrue to Contractor. Contractor shall give Owner timely notice of the availability of cash discounts to permit Owner, if it chooses, to make such deposits with Contractor.

**Section 7.3** Contractor Volume Pricing. Contractor shall endeavor to combine purchases for materials, equipment, or supplies and take such other steps as are necessary to permit obtaining all materials, equipment, appliances and supplies at the best possible prices through volume pricing.

**Section 7.4 Owner Volume Pricing.** If Owner elects to do so, Owner may acquire any materials, equipment, or supplies for delivery to the Project directly through Owner's purchasing programs. If Contractor is billed directly by the suppliers of any such items, Contractor shall pay all such costs and such costs shall be included in the Cost of the Work. If Owner pays any such costs directly, costs shall be shown on Contractor's next occurring request for payment as a credit to the Cost of the Work.

**Section 7.5 Sale of Surplus Materials.** Any surplus equipment, tools, materials, or supplies purchased for the performance of the Work pursuant to Section 5.3.1.4 which are used but not consumed in the Work, shall be the property of Owner and shall be delivered to Owner upon completion of the Work in accordance with instructions furnished by Owner. If Owner elects, such unused equipment and materials shall be sold by Contractor at a price and under terms recommended by Contractor as approved in writing by Owner. Contractor may opt to purchase any such items from Owner at a purchase price equal to the original cost charged to Owner, less the reduction in fair market value or such other price that is mutually acceptable to Owner and Contractor. Upon request by Owner, Contractor shall furnish Owner with any information and documentation necessary to verify the period of time for which such items were used in connection with the Work.

**Section 7.6 Retention of Fees.** All sums Contractor is permitted to retain from remittances of fees or taxes paid to the State of California or any other Governing Authority, whether federal, state or local for sales tax applicable to procurement of equipment, materials and supplies in the performance of the Work shall accrue to Owner.

**Section 7.7 Effect of Accrual to Owner.** Amounts that accrue to Owner in accordance with the provisions of Sections 7.1 through 7.6 shall be credited to Owner as a deduction from the Cost of the Work and such credits shall be shown on Contractor's next occurring Progress Payment.

**Section 7.8 Net-Plus Program.** Notwithstanding anything to the contrary contained in this Article 7, all cash rebates, refunds and discounts that are provided to Owner through its participation in the "Net-Plus Program" operated by its Affiliates or Lennar Corporation, or any other similar rebate program, as well as any rebates, refunds and discounts from any local, state or federal governments (including but not limited to agencies and utilities) will be paid directly to Owner. However, such cash rebates, refunds and discounts will not be a deduction of the Cost of the Work or the GMP.

## **ARTICLE 8**

### **SUBCONTRACTS, SUBCONTRACTORS AND SUPPLIERS**

**Section 8.1 Subcontracting.** Those portions of the Work that Contractor does not customarily perform with Contractor's own personnel may be performed under subcontracts or by other appropriate agreements with Contractor. Due care shall be exercised by Contractor in the selection of Subcontractors, Mechanics and Suppliers.

**Section 8.2 Definitions.**



**Section 8.2.1** A "**Subcontractor**" is a person, firm, corporation or entity and all of its employees who has or have a direct or indirect contract with Contractor to perform a portion of the Work, supply materials, equipment or any other item related to the Work. The term "Subcontractor" does not include a separate contractor or subcontractors of a separate contractor.

**Section 8.2.2** A "**Mechanic**" is anyone involved with the Work at the request of Contractor including, without limitation, all (i) Subcontractors of Contractor; (ii) all Suppliers of Contractor; (iii) Subcontractors' subcontractors ("**Sub-tier Subcontractors**"); (iv) Subcontractor's Suppliers, and (v) each of their respective agents, employees and workmen engaged by any of them in with the performance of the Work. This definition is for the sole purpose of the Agreement and General Conditions and nothing in this Section is intended to or shall extend mechanics' lien rights to anyone beyond those rights provided by applicable statute, subject to the definitions provided herein.

**Section 8.3** Responsibility of Contractor. Contractor is fully responsible for the acts and omissions of Subcontractors, Mechanics and Suppliers and persons employed by them.

**Section 8.4** Bidding and Subcontractor Selection.

**Section 8.4.1** Contractor acknowledges and agrees that it is, and the Subcontractors and Sub-tier Subcontractors are, required to strictly comply with any and all applicable bidding provisions of the PLA and the VDDA.

**Section 8.4.2** Within the time specified by the Contract Documents or if not specified, as soon as practical after the Effective Date, Contractor shall obtain bids from Subcontractors, including those who are to perform any Design/Build Work (if applicable), and from Suppliers of materials or equipment fabricated to a special design. Contractor shall then determine, with the advice of Owner and Architect (if Owner requests such service from Architect) which bids will be accepted. Owner's failure to object to any bid does not waive its rights for indemnity or any other recourse available under the Agreement or the General Conditions.

**Section 8.4.3** Contractor acknowledges that there are no Owner "nominated" subcontractors, notwithstanding any existing or prior contractual relationship between any subcontractor and Owner. Notwithstanding any pre-existing relationship between any Subcontractors and Owner, Contractor shall assume responsibility for all Subcontractors, qualify subcontractors in the same manner as any other subcontractor and shall report any reservation to Owner regarding any potential subcontractor to Owner in writing prior to executing any subcontract.

**Section 8.4.4** Owner may designate specific persons or entities from whom Contractor shall obtain bids; however, Owner may not prohibit Contractor from obtaining bids from others.

Section 8.4.5 If a specific bidder among those whose bids are received by Contractor (1) is recommended to Owner by Contractor; (2) is qualified to perform that portion of the Work; and (3) has submitted a bid that conforms to the requirements of the Contract Documents, but Owner requires that another bid be accepted, then Contractor may require that a Change Order be issued to adjust the GMP by the difference between the bid of the person or entity recommended to Owner by Contractor and the amount of the subcontract or other agreement actually executed and delivered with the person or entity designated by Owner after equitable adjustment for any differences in scope between the two bids. However, when such bid is required to be accepted by Contractor to meet the terms of the PLA or the VDDA, Contractor shall not be entitled a Change Order under the terms of this provision.

Section 8.4.6 Contractor shall not be required to contract with anyone to whom Contractor has reasonable objection.

Section 8.5 Subcontracts.

Section 8.5.1 Each subcontract shall be in writing and shall, at a minimum:

(i) provide that the Subcontractor shall perform the Work for Owner for the same contract price as provided in the subcontract in the event the subcontract is assigned to Owner or Contractor is terminated or abandons the Project;

(ii) provide that the subcontract is assignable to Owner. When Owner accepts the assignment, Owner assumes Contractor's rights and obligations. Upon such assignment to Owner, Owner may further assign the subcontract to a successor contractor or other entity;

(iii) provide that Owner is an intended third-party beneficiary of such subcontract;

(iv) be terminable on notice;

(v) contain indemnity provisions substantially identical to those set forth in Article 5 of the General Conditions. In no event shall the indemnity provisions be less inclusive or stringent as than those stated in Article 5 of the General Conditions;

(vi) contain alternate dispute resolution provisions identical to those set forth in Article 16 of the General Conditions;

(vii) contain insurance provisions substantially identical as those set forth in Article 11 of the General Conditions, but in no event shall the insurance provisions require less inclusive or stringent terms than those stated in Article 11 of the General Conditions;

(viii) specifically acknowledge familiarity with the Contract Documents, including the PLA, the VDDA, Article 31 Plans, the ADMP and the Project MMRP;

(ix) require strict compliance with the applicable provisions of the Contract Documents, including the PLA, the VDDA, Article 31 Plans, ADMP and Project MMRP (including all indemnity obligations therein) and each subcontract shall incorporate by reference all of the requirements set forth in the PLA, the VDDA, Article 31 Plans, ADMP and Project MMRP including but not limited to:

- (a) The "Agreement to Be Bound" contained in the PLA;
- (b) The requirement to be a signatory to a collective bargaining agreement with the local union as required contained in the PLA;
- (c) The Agency Policies as defined in the VDDA, including but not limited to Riders 1 through 6, to the extent applicable. For Riders only referencing "Consultant" and which do not place requirements on Subcontractors, the term "Consultant" in all such Riders is synonymous with the term "Subcontractor" for purposes of the subcontracts. The Riders are as follows:
  - (1) Rider 1 – Prevailing Wage Requirements
  - (2) Rider 2 – Minimum Compensation Requirement
  - (3) Rider 3 – Health Care Accountability Policy
  - (4) Rider 4 – Bayview Hunters Point Employment and Contracting Policy
  - (5) Rider 5 – Mentorship Program
  - (6) Rider 6 – Small Business Assistance Program.

(x) include and incorporate the Nondiscrimination Policy set forth in Section 9.1, and include a requirement that all Sub-tier Subcontractors include this nondiscrimination policy;

(xi) conform to the applicable payment provisions of Section 11;

(xii) require each Subcontractor, to the extent of the Work to be performed by Subcontractor, to be bound to Contractor by terms of the Contract Documents, and to assume toward Contractor all the obligations and responsibilities, including the responsibility for safety of

Subcontractor's Work, which Contractor, by this Agreement and the General Conditions, assumes toward Owner, Owner's consultants and Architect;

(xiii) preserve and protect the rights of Owner, Owner's consultants and Architect under the Contract Documents with respect to the Work to be performed by Subcontractor so that subcontracting thereof will not prejudice such rights. Where appropriate, Contractor shall require each Subcontractor to enter into similar agreements with its subcontractors. Contractor shall make available to each proposed Subcontractor, prior to the execution of the subcontract, copies of all of the Contract Documents to which Subcontractor will be bound, and, upon written request of Subcontractor, identify to Subcontractor terms and conditions of the proposed subcontract which may be at variance with Contract Documents. Contractor will require Subcontractors to make copies of the Contract Documents available to their respective proposed subcontractors;

(xiv) provide that each Subcontractor maintain and preserve Work Records and Payroll Records (defined below) and provide access to and cooperate with Owner's review or audits in the same manner as Contractor is required by Article 10. Contractor shall require each Subcontractor to retain its Work Records for a period of at least ten (10) years after the date of Final Completion and its Payroll Records for a period of at least five (5) years after the date of Final Completion.

**Section 8.5.2** Contractor shall submit to Owner for its approval copies of each subcontract before Contractor enters into such subcontract. Owner will review and provide comments to Contractor within five (5) Business Days from receipt. However, Owner agrees to waive this requirement for the surveying, shoring and earthwork subcontracts until after they have been issued to the Subcontractor in order to facilitate the start of construction. Owner's approval or failure to object to the form or contents of any subcontract does not waive any of its rights for indemnity or any other recourse available to Owner under this Agreement or the General Conditions. Contractor shall remain solely responsible for strict compliance with the Contract Documents, including but not limited to the PLA and the VDDA.

**Section 8.5.3** Contractor will not require any BVHP Area Contractor as defined by the Community Benefits Plan which is attached to the VDDA to obtain any surety bonds or warranty bonds for the work at the Project.

**Section 8.6** If Owner instructs Contractor to terminate any Subcontractor, Contractor shall immediately do so upon receipt of written notice from Owner and shall replace such Subcontractor with a new Subcontractor acceptable to Owner. Owner shall indemnify, defend and hold Contractor harmless from and against any claims, liabilities, damages, costs and expenses caused by the termination of any such Subcontractor, and will pay for all costs, including excess re-procurements costs on a Change Order except to the extent caused by Contractor's improper actions in connection with any such termination.

## **Section 8.7 Suppliers.**

**Section 8.7.1** A "**Supplier**" is a manufacturer, fabricator, supplier, distributor, materialman or vendor having a direct contract with Contractor or with any Subcontractors or Mechanics to furnish material or equipment to be incorporated in the Work or facilitate performance thereof.

**Section 8.7.2** Contractor shall, within sixty (60) days after the Effective Date, submit to Owner Contractor's statement showing the names and addresses of all of Contractor's Suppliers including all persons from whom Contractor expects to request or has requested services, materials, fixtures, or machinery and equipment for use or installation in connection with the Work (the "**Supplier Statement**"). Accordingly, Contractor shall affect seventy-five (75%) percent of the buyout within such sixty (60) day period, and except as authorized by Owner in writing, eliminate all Allowances within the Schedule of Values.

**Section 8.7.3** Owner may object to any person or entity identified in the Supplier Statement by notifying Contractor of Owner's objection within ten (10) days after receipt of the Supplier Statement. If Owner timely objects to any person or entity identified in the Supplier Statement, Contractor shall submit a Change Order Request pursuant to Article 8 of the General Conditions identifying alternatives and any effects on the Contract Sum or the Contract Time, or both, for Owner's review and approval. Upon approval, Contractor shall replace the objectionable Supplier.

**Section 8.7.4** No changes or additions to the Supplier Statement will be made without the prior written consent of Owner.

## **ARTICLE 9 OTHER AGREEMENTS**

**Section 9.1 Nondiscrimination Policy.** Contractor shall not discriminate against any employee of, any Agency employee working with, any member of the public having contact with, or any applicant for employment with, such Contractor or Subcontractor on the basis of the fact or perception of a person's race, color, creed, religion, ancestry, national origin, age, sex, Domestic Partner status, Gender Identity, Sexual Orientation, marital status, disability of AIDS/HIV status. As used in this Section 9.1, the term "**Domestic Partner**" shall mean any person who has a currently registered Domestic Partnership with a governmental body pursuant to state or local law authorizing such registration, and "**Gender Identity**" shall mean a person's various individual attributes as they are understood to be masculine and/or feminine, and "**Sexual Orientation**" shall mean the status of being lesbian, gay, bisexual or heterosexual.

**Section 9.1.1** Contractor shall post in conspicuous places, available to employees and applicants for employment, notices required by the EEO Laws, defined below. Contractor shall, at its own cost and expense, conform to the equal employment opportunity requirements promulgated by governmental authorities including, without

limitation, the requirements of the Civil Rights Act of 1964, United States Code Title 42, Section 1983, Executive Order Nos. 11246, 11375 and 11478, and any other applicable statutes or ordinances, plans or programs inclusive, and all successors and amendments thereto, and all plans, programs, standards and regulations which have been, or shall be, promulgated by the agencies which administer such regulations (the "EEO Laws"). Contractor shall have and exercise full responsibility for compliance hereunder by itself, its agents, its employees, its Mechanics and its Subcontractors with respect to the Work. Contractor shall directly receive and respond to, defend and be responsible for any citation, order, claim, charge or criminal or civil actions arising by reason of the failure of Contractor or its agents, its employees, its Mechanics and/or its Subcontractors to so comply regardless of whether such non-compliance is the sole or a contributory cause of any of those matters against which Contractor is obligated hereunder. Contractor shall indemnify, defend (at Contractor's sole cost with legal counsel acceptable to Owner) and hold harmless the Indemnified Parties occasioned by the suspension, cancellation or termination of any contract (or Owner's eligibility therefore), damage, costs, claims, awards, judgments, fines, expenses, including litigation expenses, reasonable attorneys' fees, claims or liability for harm to person or property, expenses incurred pursuant to, or attendant to, any hearing or meeting or any other applicable costs which may be incurred by Owner and its respective agents and employees as a result of Contractor's failure to comply with the covenants as set forth herein, to the greatest extent permitted by law. Contractor's failure to comply with any of the EEO Laws, or any judgment, order or award issued by the Office of Federal Contract Compliance, Office of the United States Department of Labor, or any other federal, state or local agency or any court of law, or any other body responsible for the administration and/or enforcement of any of the EEO Laws, within the period specified in any such laws, judgment, order or award, shall be a material default under this Agreement and Owner may, at its sole discretion and absolute, exercise the rights and remedies provided Owner under the Contract Documents.

**Section 9.2** Contractor shall strictly comply with the applicable provisions of the PLA and the VDDA, (including all indemnification obligations therein) including but not limited to the following:

- (i) The "Agreement to Be Bound" contained in the PLA;
- (ii) The requirement to be a signatory to a collective bargaining agreement with the local union as required contained in the PLA;
- (iii) The Agency Policies, as defined in the VDDA, including but not limited to Riders 1 through 6, to the extent applicable. For Riders only referencing "Consultant" and which do not place requirements on Contractors, the term "Consultant" in all such Riders is synonymous with the term "Contractor". The references in Riders 1, 2 and 3 to "Subcontractor" applies equally to Contractor. The Riders are as follows:

- (a) Rider 1 – Prevailing Wage Requirements

- (b) Rider 2 – Minimum Compensation Requirement
- (c) Rider 3 – Health Care Accountability Policy
- (d) Rider 4 – Bayview Hunters Point Employment and Contracting Policy
- (e) Rider 5 – Mentorship Program
- (f) Rider 6 – Small Business Assistance Program.

## ARTICLE 10 FINANCIAL RECORDS AND WORK RECORDS

**Section 10.1** Contractor shall maintain full and detailed records relating to (i) the performance of the Work (the "**Work Records**"), and (ii) accounting and financial records, including Payroll Records, related in any manner to the Cost of the Work and Contractor's Fee (collectively, the "**Financial Records**"). Maintenance of Work Records and the Financial Records is a material consideration for Owner to enter into this Agreement. Owner (including its designated representatives, auditors, accountants, and quality control consultants) shall be afforded access to all of Contractor's records, books, correspondence, instruments, receipts, vouchers, meeting minutes, memoranda, change orders, subcontracts, purchase orders, insurance policies, and supporting applications and date, and similar data relating to the Financial Records, and all such records and any Drawings, and Specifications relating to the Work Records, during reasonable business hours. Contractor shall cooperate fully with all reasonable requests of Owner for any such audit or inspections of the Financial Records or the Work Records. Contractor shall require each Subcontractor to maintain full and detailed Work Records and Payroll Records.

**Section 10.2** Retention of Records. Contractor shall retain and preserve all of (i) the Work Records for a period of at least ten (10) years after the date of Final Completion and (ii) the Financial Records for a period of at least five (5) years after the date of Final Completion.

**Section 10.3** Payroll Records. Contractor shall maintain accurate payroll records, showing the name, address, social security number, work classification, straight time, and overtime hours, worked each day and week, and the actual wages paid ("Payroll Records") for its employees performing any Work on the Project, and shall comply with California Labor Code Section 1776. Contractor shall notify Owner within ten (10) Business Days after any employee of Contractor either ceases or begins to perform Work on the Project, or after the proportion of any such employee's performance of service directly for the benefit of the Project is modified permanently from the information for such employee that is set forth in Exhibit G-1 hereto, as amended from time to time. Contractor shall deliver an updated version of Exhibit G-1 concurrently with such notice to Owner showing the fully-burdened rates paid to any employee of Contractor.

**Section 10.4** If any inspection by Owner of Contractor's Financial or Work Records, and any other data relating to the Contract Documents reveals an overcharge, including without limitation, any untimely request for payment as described in this Agreement, Contractor shall pay Owner upon demand an amount equal to the total overcharge plus interest at the Stipulated Interest Rate on the amount of such overcharge for the number of days that the overcharge has been outstanding, as reimbursement for said overcharge and the administrative expenses incurred in determining the overcharge. The requirements of this provision shall not apply to any portion of an overcharge that is the subject of a good faith dispute between Owner and Contractor.

## **ARTICLE 11 PAYMENTS**

### **Section 11.1 Progress Payments.**

**Section 11.1.1** Upon the Effective Date of this Agreement, Contractor shall furnish to Owner in a form reasonably satisfactory to Owner an estimated cash flow projection to assist Owner in anticipating the timing and amount of payments required to be made hereunder by Owner. During the term of this Agreement, Contractor shall be entitled to receive periodic monthly payments (each a "Progress Payment") based upon an Application for Payment, which shall be in the form of attached hereto as Exhibit I and shall include a complete description of the services for which Contractor is seeking payment, labor and material supplied, and deposits required for Contractor's procurement of long lead time or custom specialty products required by the Contract Documents which deposits are reasonably necessary for the proper and timely performance of the Work, as well as the Work completed.

**Section 11.1.2** On or before the twenty-fifth (25th) day of the month immediately preceding a month in which Contractor will submit an Application for Payment, Owner and Architect (if requested by Owner) and Contractor shall meet to review a preliminary draft of such Application for Payment prepared by Contractor ("Pencil Draw"). Contractor shall revise the Pencil Draw in accordance with any objection or recommendation of Owner or, to the extent applicable, Architect or any Lender. The revised Pencil Draw shall be resubmitted by Contractor to Owner as the Application for Payment due on the fifth (5th) day of the month immediately following the month in which the Pencil Draw was first submitted. Contractor shall also submit with each Application for Payment a written narrative describing the basis for any item set forth in the Application for Payment that does not conform to instructions of Owner, or Architect. Each Application for Payment shall be submitted no later than the fifth (5th) day of each month, or the first Business Day thereafter if the fifth (5th) day of the month falls on a day other than a Business Day. Each Application for Payment must include the following:

(a) a duly executed and acknowledged Contractor's Sworn Statement showing all trade payment breakdown for the Work for which Contractor and each Subcontractor is responsible, with such breakdown being submitted on a standardized form reasonably approved by Owner, and the amount to be paid to Contractor (Form AIA G703 Continuation Sheet or such other form as Owner may reasonably require).



(b) Copies of all invoices for all materials suitably stored Off-Site, including bills of lading, lists of all materials purchased and invoices for such materials and a sufficient number of photographs to accurately depict the Work for which Contractor is requesting payment; to the extent agreed upon by Contractor and Owner as evidenced by the sample Pay Application;

(c) With each Application for Payment, Contractor shall furnish Owner with a Lien Indemnity, in the form attached to Agreement as **Exhibit X**, covering all Subcontractors, Mechanics, and Suppliers. Contractor shall require Subcontractors to submit to Contractor waiver and release forms that shall include the following:

(i) completed conditional waiver and release forms from all Subcontractors (and their sub-tier subcontractors, Suppliers, Mechanics, if any) for whose work in the preceding month payment is sought in the Application of Payment; and

(ii) completed unconditional waiver and release forms for all Subcontractors, Suppliers, and Mechanics for whose work and/or materials payment was made by Owner in response to Contractor's immediately preceding Application for Payment.

Each waiver and release shall cover all Work, labor and materials, including but not limited to equipment and fixtures of all kinds, done, performed or furnished in connection with the portion of the Work included in the Application for Payment to which it pertains and shall be signed only by an authorized representative of Subcontractor, Supplier or Mechanic named therein. Contractor shall submit waiver and release forms from all Subcontractors, Suppliers or Mechanics with the Final Application for Payment.

(d) A trade payment breakdown for the Work for which Contractor and each Subcontractor is responsible, with such breakdown being submitted on a standardized form reasonably approved by Owner. The form shall be divided in detail sufficient to exhibit areas, floors, and/or sections of the Work, and/or by convenient units and shall be updated as reasonably required by Owner as necessary to reflect the (i) description of Work (listing labor and material separately), (ii) total value, (iii) percentage of the Work completed to date, (iv) value of Work completed to date, (v) percent of previous amount billed, (vi) previous amount billed, (vii) current percent completed, and (viii) value of Work completed to date. Any trade breakdown that fails to include sufficient detail, is unbalanced, or exhibits "front-loading" of the value of the Work shall be rejected. If the trade breakdown had been initially approved and subsequently used but later was found improper for any reason, sufficient funds may be withheld from future Progress Payments to ensure an adequate reserve (exclusive of normal retainage) to complete the Work; and

(e) Contractor's summary of all costs and activities for the most recent billing cycle and, to the extent requested by Owner, Architect or Lender, such other information, documentation and materials needed to evaluate the Application for Payment.

**Section 11.1.3** Each Application for Payment shall be based upon the most recent Schedule of Values (which shall take into consideration Change Orders) incorporated within the Application for Payment to assess the Work completed to date at the beginning of each Application for Payment cycle. The Schedule of Values shall allocate the entire GMP among various portions of the Work, except that Contractor's Fee shall be shown as a single separate item and will be prepared in such form and supported by such data to substantiate its accuracy as Owner or Lender may reasonably require.

**Section 11.1.4** Owner, in consultation with Architect, will evaluate Contractor's Application for Payment within ten (10) days after receipt and issue to Contractor an approval or disapproval of all or a designated portion of the submitted Application for Payment for such amount as Owner determines is properly due, immediately notifying Contractor in writing of its reasons for withholding approval in whole or in part.

**Section 11.1.5** Approval of an Application for Payment or Owner's payment of all or any portion of the Application for Payment shall not constitute (i) a representation by Owner or any other party that the Work conforms to the Contract Documents; (ii) an acceptance of any nonconforming Work; or (iii) a waiver of any term, condition, covenant or other provision of the Contract Documents.

**Section 11.1.6** If Owner or Architect determines that the Application for Payment does not accurately reflect the quantity or quality of the Work actually performed by Contractor or any Subcontractor, Owner may withhold payment for such disputed Work as more particularly set forth in Section 11.3. Owner and Contractor shall attempt to informally resolve any such dispute as to such Application for Payment. Owner shall issue a Progress Payment to Contractor with respect to any portion of the Application for Payment which is not in dispute. If Owner and Contractor are unable informally to resolve the dispute, the dispute shall be resolved in accordance with the provisions of Article 16 of the General Conditions. Owner may withhold payment to Contractor for such disputed items until any such dispute is resolved. When all disputes with respect to any sum due Contractor have been fully resolved by Owner and Contractor, Owner shall remit payment to Contractor with the next Progress Payment.

**Section 11.1.7** If Contractor submits an Application for Payment that is not in proper form, then Owner shall notify Contractor in writing of such deficiency and Owner shall issue a Progress Payment to Contractor for that portion of the Application for Payment which is in proper form. Owner may withhold payment for that portion of the Application for Payment which is not in proper form a revised Application for Payment is submitted in proper form.

**Section 11.1.8** Owner will remit to Contractor the approved portion of the Progress Payment less retainage of ten percent (10%), and less any amounts Owner may withhold or deduct in accordance with any applicable provision of the Contract, within thirty (30) days after receipt of an approved Application for Payment, or with the next-occurring payment with respect to any Application for Payment not received in accordance with the schedule set forth in Section 11.1.2.

**Section 11.1.9**      **Computation of Amount.** Each Application for Payment shall show Contractor's general condition expenses billed as agreed to by Owner and Contractor, and the percentage of completion of each portion of the Work other (than Contractor's general condition expenses) that has been completed, all as of the end of the period covered by the Application for Payment. Such percentage of completion of the Work shall be the percentage of that portion of the Work that has actually been completed. Subject to other express provisions of the Contract Documents, the amount of each Progress Payment shall be computed as follows:

(a) Take that portion of the GMP properly allocated to completed Work as determined by multiplying the percentage completion of each portion of the Work by the share of the GMP allocated to that portion of the Work in the Schedule of Values.

(b) Add that portion of the GMP properly allocated to materials and equipment delivered and suitably stored at the Project Site for subsequent incorporation in the Work or, if approved in advance by Owner as set forth in the General Conditions, suitably stored Off-Site at a location agreed upon in writing.

(c) Add Contractor's Fee, which shall be an amount which bears the same ratio to that fixed-sum Fee as the Cost of the Work in clauses (a) and (b) above bears to the Cost of the Work upon its completion as set forth in the most recent Schedule of Values, subject to the provisions of the General Conditions.

(d) Subtract any Credit due and owing to Owner or its Affiliates pursuant to Section 28 of James E. Roberts-Obayashi Corporation's Consulting Agreement, with an Effective Date of 12/29/08.

(e) Subtract a sum equal to ten percent (10%) of (i) the total cost of the Work which is the subject of the Application for Payment less (ii) Contractor's general condition expenses for the period for which the Application for Payment is being submitted. When Owner and Contractor agree that the Work is seventy-five percent (75%) complete, and subject to Lender's consent thereto, Owner shall have the option, but not the obligation, to reduce the retainage requirement or to release a portion of the retainage prior to the date specified in the Contract Documents. Notwithstanding the foregoing, Owner and Contractor agree that Contractor may request the release of retainage with respect to Subcontractors identified in Exhibit J hereto, which request will be granted by Owner if approved by Lender and upon satisfaction of the following conditions: (i) the Work is on schedule (as evidenced by the accomplishment of Milestone Dates) and on budget (as evidenced by the most recent Application for Payment); (ii) any Subcontractor for whom retainage is being released is not in default under its subcontract and has completed, to Owner and Architect's satisfaction, all of its portion of the Work, including, without limitation, any Punchlist work; and (iii) at least sixty (60) days have passed since the completion and acceptance of the Work of the applicable Subcontractor. Any exercise of this option, however, shall not be a waiver of (1) any of Owner's rights to hold retainage in connection with other payments to Contractor, or (2) any other rights or remedies that Owner has under the Contract Documents at law or in equity.

(f) Subtract the aggregate of previous payments made by Owner.

(g) Subtract the shortfall, if any, indicated by Contractor in the documentation required to substantiate prior Applications for Payment or resulting from errors subsequently discovered by Owner's accountants in such documentation.

(h) Subtract amounts, if any, which Owner has withheld in accordance with the provisions of Section 11.3.

#### **Section 11.2      Substantial Completion and Final Payment.**

**Section 11.2.1      Certificate of Substantial Completion.** When Contractor determines that it has met all of its obligations under the Contract Documents, whether on the Project as a whole, or with respect to any portion of the Project that Owner has requested be completed and released separately from other portions of the Project, and that the Work (or portion thereof) is ready for its intended use and can legally be occupied by Owner with all services, equipment, and utilities fully operational, Contractor shall certify to Architect and Owner that the Work (or portion thereof) is substantially complete (except for items specifically listed by Contractor as incomplete) in accordance with the provisions of the Contract Documents (the "**Contractor's Notice of Substantial Completion**"). Thereafter, in accordance with the procedures set forth in the Specifications and herein, Owner, Contractor and Architect shall make an inspection of the Work (or portion thereof) to determine the status of completion. If Owner or Architect does or do not consider the Work (or portion thereof) substantially complete, Owner or Architect shall notify Contractor in writing giving the reasons for such determination. If Architect considers the Work substantially complete, Architect shall prepare and deliver to Owner a preliminary Certificate of Substantial Completion. The preliminary Certificate of Substantial Completion shall include by attachment a preliminary list of items to be completed or corrected before final payment (the "**Preliminary Punchlist**"). Owner shall review the preliminary Certificate of Substantial Completion and the Preliminary Punchlist and notify Architect and Contractor of any objections or additions. If Owner determines, in its sole and absolute discretion, that the Preliminary Punchlist contains substantial or an excessive number of items, then Owner can direct Architect to withhold certification until Owner agrees with Architect that the Project is substantially complete. If, on the other hand, Owner agrees with the certification, then Architect shall revise the Certificate of Substantial Completion to reflect Owner's objections or additions and shall promptly thereafter notify Contractor thereof. A definitive Certificate of Substantial Completion shall then be issued by Architect with the final list of items to be completed or corrected before final payment (the "**Punchlist**"). If there is a delay, which is not the result of acts or omissions of Contractor, in Architect's issuance of such definitive Certificate of Substantial Completion in excess of five (5) Business Days after Owner agrees with the certification, then Contractor shall notify Owner and Architect in writing of such delay.

**Section 11.2.2      Punchlist.** Within five (5) Business Days after Contractor's receipt of the Punchlist, Contractor will provide Owner with a schedule to

complete the work set forth on the Punchlist. Owner must agree to the schedule for completion of the Punchlist.

**Section 11.2.3 Substantial Completion Application for Payment.**

Within ten (10) days after the issuance of the definitive Certificate of Substantial Completion, Contractor will submit Contractor's Application for Payment for all Work completed on which the Certificate of Substantial Completion is based, in accordance with the applicable provisions of Section 11.1, including the obligation of Owner and Contractor to meet to review the submitted Application for Payment and Contractor's resubmission to Owner within five (5) Business Days of the agreed-upon revised Application for Payment, together with all applicable supporting materials required by Section 11.1.2, above.

**Section 11.2.4 Payment.** Within thirty (30) days after

Contractor's submission to Owner of the Application for Payment, provided Contractor has provided all required supporting documents to Owner and has achieved Substantial Completion by the Contract Time, Owner shall pay Contractor an amount sufficient to increase the total payments to Contractor to ninety-five percent (95%) of the Contract Sum, less such amounts permitted under the Contract and less one hundred fifty percent (150%) of the estimated cost to complete the Punchlist. If Contractor has not achieved Substantial Completion by the Contract Time, then the amount Owner is required to pay Contractor may be further reduced by the amount of any liquidated damages authorized under Sections 9.9 of the General Conditions.

**Section 11.2.5** After Contractor has, in the sole and absolute

discretion of Owner following consultation with Architect: (a) satisfactorily completed all corrections identified during the final inspection and set forth on the final Punchlist, (b) performed all of the Work required under the Contract needed for Owner to obtain the Final Occupancy permit (c) has delivered, all of the items set forth below as well as those that are Contractor's responsibility as set forth in the Specifications, this Agreement and the General Conditions, and (d) satisfactorily completed Contractor's final cleaning of the Project in accordance with the requirements of the Specifications and General Conditions, then Contractor may make its final application for payment (the "Final Application for Payment") following the same procedures for Progress Payments. Contractor's Final Application for Payment shall be accompanied by (except to the extent previously delivered):

(i) A complete list of Subcontractors, including addresses, telephone numbers and names of individual representatives of the Subcontractors who are familiar with the Project;

(ii) Contractor's affidavit, together with evidence, satisfactory to Owner and Lender, establishing Contractor's full payment of all amounts due all Subcontractors, Mechanics, and Suppliers (with the exception of retentions and final payments);

(iii) One set of all written guarantees and warranties from all Subcontractors, in form and content acceptable to Owner;

(iv) One set of blueline prints of all Design/Build Work and all As-Built Drawings and a complete list thereof certified by Contractor, as well as the record set of Drawings and Specifications, addenda, Change Orders, other modifications and approved Submittals maintained at the Project Site by Contractor, and, and other Contract Documents pertaining thereto;

(v) The warranty binders required under Section 4.1.7 of the General Conditions.

(vi) Conditional Waiver and Release Upon Final Payment for Contractor and each Subcontractor, Mechanic and Supplier or acceptable bonds or other collateral permitted by the Contract Documents;

(vii) Evidence of the absence of any liens recorded against the Project or any portion thereof, as well as the absence of stop notices served on Lender, and evidence that all fixtures and equipment required under this Agreement for the operation of the Project have been installed and that the same are free and clear of all liens, title retention agreements and security interests. A Preliminary Title Report provided by Owner or compliance by Contractor with Section 11.1.2 shall constitute such evidence of the absence of any liens recorded against the Project;

(viii) Evidence of the continued effectiveness of any insurance required pursuant to Article 11 of the General Conditions and all other Contract Documents after Final Payment is made, and Contractor's certificate that Contractor possesses no information that such insurance will not be renewed or renewable for the entire period required pursuant to Article 11 of the General Conditions;

(ix) The consent of any surety to Final Payment on AIA Form G706 or such other mutually agreeable form;

(x) Any certificates, licenses, or permits issued by any Governing Authorities required by the Contract Documents to evidence compliance of the Work with Applicable Laws;

(xi) The training of Owner's designated personnel with respect to use, maintenance, and operation of all equipment installed at the Project; and

(xii) All of the Project Closeout Forms, properly completed and executed, as set forth in attached Exhibit K or as otherwise called for in the Contract Documents.

**Section 11.2.5.1** If any Subcontractor, Mechanic or Supplier fails to furnish the lien waiver required by Section 11.2.5(vi), Contractor may furnish a bond or other collateral satisfactory to Owner and Lender to indemnify against, and hold Owner, the Project, and the Lender harmless from any lien of such Subcontractor, Mechanic or Supplier.

**Section 11.2.5.2** Provided Owner is not in default of its payment obligations to Contractor, Contractor shall promptly and satisfactorily settle all claims for services performed and materials furnished in connection with the Work. If Contractor fails or refuses to promptly and satisfactorily settle any claim, or to bond around the claim pursuant to Section 11.6, Owner, after written notice to Contractor, shall have the right (but not the obligation) to withhold from subsequent Applications for Payment an amount equal to one hundred fifty percent (150%) of the amount claimed or in dispute.

**Section 11.2.6** Payment Upon Final Completion. If, on the basis of Owner's and Architect's observations of the Work during final inspection and Owner's review of the Final Application for Payment and accompanying documentation as required by the Contract Documents, Owner is satisfied that the Work has been completed and Contractor's obligations under the Contract Documents have been fulfilled, Owner will, within fifteen (15) days after receipt of the Final Application for Payment, indicate in writing Owner's approval of the Final Application for Payment. Otherwise, Owner will return the Final Application for Payment to Contractor, indicating in writing the reasons for not approving Final Payment. Contractor, shall then make the necessary corrections and resubmit the Final Application for Payment. Thirty-five (35) days after presentation to Owner of the approved Final Application for Payment and all required accompanying documentation, the amount approved by Owner will become due and payable by Owner to Contractor.

The acceptance of Final Payment by Contractor shall constitute a waiver of all claims for adjustments to the Contract Time or additional compensation by Contractor, except those previously made in writing and identified by Contractor, as unsettled at the time of the Final Application for Payment.

**Section 11.3** Right to Withhold Payments.

Owner may withhold all or the applicable portion of any Progress Payment or Final Payment otherwise due Contractor for any of the following reasons:

(a) Omission of any Work required by the Contract Documents or Contractor's failure to cure Defective Work (up to one hundred fifty percent (150%) of the cost associated with such omissions or failure);

(b) Failure to submit to Owner all information (including complete and qualifying evidence of insurance in accordance with the provisions of Article 11 of the General Conditions), and all lien waivers and releases required under the Contract Documents;

(c) Recordation or filing of mechanics' liens, supplier's liens, stop notices or bonded claims which are recorded or filed by Contractor or its Subcontractors, Mechanics or Suppliers, which claims are not bonded pursuant to Section 11.6, in which case Owner may withhold in the case of a lien, stop notice, or notice of claim one hundred fifty percent (150%) of the amount sought; provided, however, the lien, stop notice or claims do not arise from Owner's default in its payment obligations hereunder;

(d) Contractor's failure to make payment properly to Subcontractors, Mechanics, Suppliers, union fringe benefit trust funds (to the extent required), or insurance carriers for the insurance requirements of Contractor;

(e) Substantial evidence produced by Owner that the Work will not be completed for the balance of the Contract Sum (together with approved Change Orders) then unpaid, unless Contractor performs a sufficient portion of the remaining Work at Contractor's sole cost so that the portion of the Contract Sum (together with approved Change Orders) then remaining unpaid is reasonably determined by Owner to be sufficient to complete the Work;

(f) Contractor's failure to complete the Work, or any reasonable indication that the Work will not be completed or performed, in strict accordance with the Construction Schedule;

(g) Contractor's failure to construct, install or perform the items of the Work as required in the Contract Documents, or any reasonable indication that Contractor will be unable to perform the items of the Work required;

(h) Contractor's failure to perform any term or provision of the Contract Documents when, in Owner's reasonable judgment, such failure will or may jeopardize the timely and proper completion of the Project;

(i) Contractor or any Contractor Affiliate is in default or breach of any term or condition of any other agreement with Owner or any of Owner's Affiliate and notice thereof is or has been given to Contractor;

(j) The amount of the Application for Payment is disputed or the Application is not in the proper form as set forth in Article 11;

(k) The Punchlist has not been completed;

(l) If Contractor has not achieved Substantial Completion by the Contract Time, Owner can withhold any liquidated damages authorized under Section 9.9 of the General Conditions;

(m) If Owner cannot obtain Final Occupancy as a result of Contractor's failure to perform Work required by the Contract Documents;

(n) Any other grounds for withholding payment permitted by State or Federal law, or as otherwise permitted by the Contract Documents.

Whenever the grounds giving rise to the above withholding have been removed, Owner shall pay Contractor the amount withheld within five (5) Business days of the date Owner receives the corresponding payment from Lender on the next Progress Payment cycle (unless Owner has already received such withheld funds from Lender, in which case, the amount withheld shall be paid within five (5) Business days of the date a complete Application for Payment is received) less any expenses reasonably incurred by Owner or damages sustained by Owner as a result of the withholding, the cause of the withholding



or the removal of the cause. The right to withhold payment shall be in addition to all other rights and remedies of Owner under the Contract Documents and at law or in equity. Owner may issue a written notice to Contractor reducing the Contract Sum by an amount equal to that which Owner is entitled in the event of a credit to the Contract Sum.

**Section 11.4** All sums paid to Contractor for the partial or complete performance of the Work, and any balance of the unearned Contract Sum that is paid to Contractor, are paid in trust for the purpose of satisfying the unpaid claims of Subcontractors, Mechanics and Suppliers with respect to the Project; and such payments to Contractor shall not be due or payable to anyone else claiming in its place or stead, including, but not limited to a trustee in bankruptcy, receiver or assignee of Contractor, until and unless the Work is fully completed and the claims of all Subcontractors, Mechanics and Suppliers have been fully paid and satisfied.

**Section 11.5 Escrow Holder/Lender.**

**Section 11.5.1 Escrow Holder.** If required by Owner or Owner's Lender, all Progress Payments or the Final Payment to Contractor shall be made through a construction escrow (the "Escrow") established with an entity selected by Owner or Lender (the "Escrow Holder") in accordance with the provisions of a construction escrow or disbursement agreement which does not conflict with either Party's payment rights or remedies in this Article 11, and which shall be in form and content satisfactory to Owner, Lender, and Escrow Holder, and subject to the reasonable approval of Contractor (the "Escrow Agreement"). Upon execution by all parties thereto, the Escrow Agreement shall be attached to the General Conditions and made a part thereof. If any provision of this Agreement or the General Conditions conflicts with the Escrow Agreement, or any other provision of the Contract Documents, the Escrow Agreement shall govern. The Escrow Holder will have the responsibility and authority to disburse all Progress Payments and/or the Final Payment to which Contractor is entitled under this Agreement. Both Owner and Contractor shall use their best efforts to cooperate with the Escrow Holder and to comply with all requirements of the Escrow Agreement.

**Section 11.5.2 Construction Loan.** Contractor acknowledges that Owner may finance the Work with a loan or loans from one or more Lenders, in Owner's sole and absolute discretion. Owner must comply with certain terms and conditions embodied in Lender's construction loan agreement(s). Contractor agrees to use its best efforts to comply with the requirements of Lender that bear upon the performance of the Work. Contractor shall also:

(a) make the Project Site available at reasonable times for inspection by the Lender or the Lender's representatives;

(b) consent to and execute all documents reasonably requested by Owner in connection with the assignment of this Agreement and the Contract Documents to which Contractor is a party to Lender for collateral purposes, including the provision that Contractor agrees that, notwithstanding a default by Owner under the provisions of this Agreement that would give Contractor the right to terminate this Agreement, Contractor will continue to perform its obligations hereunder

(on the same terms and conditions as are set forth herein) for and on account of the Lender if the Lender shall agree to pay Contractor all undisputed amounts then due and owing Contractor under this Agreement and the other Contract Documents and shall agree in writing to perform all obligations of Owner hereunder accruing from and after the date of such default by Owner; and promptly furnish Owner with information, documents, and materials, including, without limitation, any commercially reasonable estoppel certificates that Owner may reasonably request from time to time in order to comply with the requirements of Lender.

**Section 11.6 Liens.** When a lien is recorded by a Subcontractor, Mechanic, Supplier or any other person or entity performing services of Work for Contractor at the Project, Contractor shall within fifteen (15) days after written notice from Owner, cause the lien to be removed from the Work and the Project Site by bond or other permanent means, unless the lien has been filed as a result of the failure of Owner to pay Contractor as required by the Agreement. If Contractor fails to remove the lien within such fifteen (15) day period, Owner is authorized, after written notice to Contractor, to use whatever means it deems appropriate to cause the lien to be removed, and the entire cost and expense thereof incurred by Owner or Owner's Lender(s) (including reasonable attorneys' fees and costs), shall be immediately due and payable to Owner by Contractor, or at Owner's option, all costs and expenses incurred by Owner and Lender shall be set off against monies due or to become due to Contractor under this Agreement. By posting a bond or other acceptable security, however, Contractor shall not be relieved of any responsibilities or obligations for indemnity pursuant to the Contract, including without limitation, the duty to defend and indemnify parties identified hereunder. The costs of any premiums incurred in connection with such bonds and security required to be provided pursuant to this Section 11.6 shall be the responsibility of Contractor and shall not be a Cost of Work or cause any adjustment to the Contract Sum.

**Section 11.6.1** Contractor may dispute any such lien, provided Contractor causes the same to be removed promptly from the Project Site in accordance with the provisions this Section 11.6.

**Section 11.6.2** Contractor shall not apply any payments made by Owner to Contractor to satisfy claims to Subcontractors, Suppliers, Mechanics, entities or insurance companies unless such claims have arisen as a result of the Work described in the invoice being paid by Owner.

## **ARTICLE 12 DISPUTE RESOLUTION**

Dispute Resolution will be as provided in Article 16 of the General Conditions.

## **ARTICLE 13 TERMINATION**

The Contract may be terminated by Contractor or Owner as provided in Article 15 of the General Conditions.

**ARTICLE 14**  
**MISCELLANEOUS PROVISIONS**

**Section 14.1** Where reference is made in this Agreement to a provision of the General Conditions or another Contract Document, the reference refers to that provision as amended or supplemented.

**Section 14.2** Owner's representative is:

John J. Robertson  
HPS1 Block 50, LLC c/o Lennar Urban  
One California Street, Suite 2700  
San Francisco, California 94111  
Telephone: 415.344.8842  
Facsimile: 415.995.1778

Contractor's representative is:

Scott Smith, President  
James E. Roberts-Obayashi  
20 Oak Court  
Danville, California 94526  
Telephone: 925.820.0600  
Facsimile: 925.820.1993

Neither Owner's nor Contractor's representative shall be changed without five (5) days' written notice to the other Party.

**Section 14.3** Assignment. No assignment of or subcontract under the Contract or any portion thereof or any money due or which may become due hereunder will be made by Contractor without the prior written consent of Owner, which consent may be withheld in Owner's sole and absolute discretion. In addition to constituting a default under the Contract, any assignment or attempted assignment made in violation of this Section 14.3 will be null and void. Contractor will be liable to Owner for all damages resulting therefrom and the assignee will acquire no rights under the Contract. If Owner does consent in writing to an assignment of a subcontract under this Contract, then the assignee or subcontractor shall be bound to all terms of the Contract, including specifically and without limitation the insurance provisions contained herein. Owner shall be entitled to delegate all or any portion of its obligations hereunder and assign all or any portion of the Contract. To the extent that Owner makes any such assignment (i) the assignee shall be "Owner" under the Contract, unless otherwise stated in the assignment, (ii) the assignor shall continue to be an "Additional Insured" for all purposes under Article 11 of the General Conditions; (iii) assignor and assignee shall be indemnified under all indemnities under the Contract (including as an Indemnified Party under Article 5 of the General Conditions); and (iv) Contractor shall make commercially reasonable efforts to cause the assignee to be named as an "additional insured" under Article 11 of the General Conditions. If required to facilitate the assignment, Contractor shall promptly execute, deliver, and acknowledge, any and all

documents and instruments reasonably requested by Owner or any purchaser or Lender, including, but not limited to, consents, estoppel certificates, and documents subordinating any rights, interests and claims under the Contract, at law or otherwise, to the liens, benefits, rights and privileges of any Lender. Contractor shall execute such additional documents as may be required by any lender to evidence the provisions hereof.

**Section 14.4 Entire Agreement.** The Contract constitutes the entire agreement between the Parties with respect to the matters covered thereby and supersedes all prior negotiations, representations and agreements with respect to the matters covered in the Contract Documents. The Contract may only be modified or amended by a document duly executed on behalf of all the Parties.



Contractor's Initials

**Section 14.5 Successors and Assigns.** Owner and Contractor each binds, itself, its successors, assigns and legal representatives to the other Party, and to the permitted successors, assigns and legal representatives of such other Party, in respect to all covenants, agreements and obligations contained the Contract Documents.

**Section 14.6 No Waiver.** The failure of a Party to waive any default or failure to enforce any of the terms, conditions, covenants, conditions, or other provisions of the Contract or any of the Contract Documents shall not in any way affect, limit, modify, or waive such Party's right to enforce or compel strict compliance with every term, covenant, condition, or other provision hereof. Unless the Contract specifically provide for a waiver, no Party hereto shall be deemed to have waived any material provision of the Contract unless it does so in writing and is signed by an authorized representative of such Party. No "course of conduct," "course of dealing," or "trade custom" shall be considered to be such a waiver, absent such a writing.

**Section 14.7 Notice.** Any notice provided for herein must be in writing and delivered (a) in person, (b) by facsimile transmission (with the original and a copy of the facsimile confirmation following in the United States mail), (c) by overnight delivery service, or (d) by certified mail, return receipt requested to:

Owner: HPS1 Block 50, LLC  
c/o Lennar Urban  
One California Street, Suite 2700  
San Francisco, California 94111  
Attention: Kofi Bonner  
Facsimile: 415.995.1778

Copy to: Gordon & Rees, LLP  
275 Battery Street, Suite 2000  
San Francisco, California 94111  
Attention: Sandy Kaplan, Esq.

Facsimile: 415.986.8054

*Copy to:* Paul, Hastings, Janofsky & Walker LLP  
55 Second Street, 24th Floor  
San Francisco, California 94105  
Attention: David Hamsher, Esq.  
Facsimile: 415.856.7123

*Contractor:* James E. Roberts-Obayashi Corp.  
20 Oak Court  
Danville, California 94526  
Attention Scott Smith  
Facsimile: 925.820.1993

Delivery of any notice shall be deemed made on the date of its actual delivery to the address of the addressee, if personally delivered, and on the date indicated in the return receipt or courier's records as of the date of delivery to that address, if sent by mail or courier. Notices by facsimile shall be deemed delivered when received by the facsimile machine of the receiving party if received before 5:00 p.m. (Pacific Time) or on a day other than a Business Day received, or if received after 5:00 p.m. (Pacific Time) or on a day other than a Business Day (i.e. Saturday, Sunday, or legal holiday), then such notice shall be deemed delivered on the following Business Day. The transmittal confirmation receipt produced by the facsimile machine of the sending party shall be prima facie evidence of such receipt. Any Party may change its address or facsimile number for notice purposes by giving notice to the other Party. With regard to any Request for Information and other similar notices relating to Contractor's performance of the Work requiring Owner's prompt attention, and Owner's responses thereto, Contractor and Owner shall provide such notice either by facsimile or personal delivery in a timely fashion, and Contractor shall include a copy of any such notice or response in Contractor's Monthly Report to Owner.

**Section 14.8 Time.** Time is of the essence of the Contract and each provision contained herein.

**Section 14.9 Words and Headings.** Words used in this Agreement will include the plural as well as the singular. Words used in the masculine gender include the feminine and neuter. The section headings used herein are for convenience only and will have no effect upon the construction or interpretation of any part of this document. Capitalized terms used but not otherwise defined in the Agreement shall have the respective meanings set forth in the General Conditions. References to Articles, Sections and clauses in this Agreement shall refer to the Articles, Sections and clauses of this Agreement unless stated otherwise.

**Section 14.10 Survival of Rights.** Any indemnity, warranty or guaranty given by Owner and Contractor in the Contract Documents shall survive the expiration or termination of this Agreement and shall be binding upon Owner and Contractor until

such date as any particular claim or action for which indemnification, warranty and guaranty may be claimed is fully and finally resolved, and, if applicable, any compromise thereof or judgment or award thereon is paid in full by Contractor, and Owner or any other indemnified party is fully reimbursed for any amounts paid in compromise thereof or upon a judgment or award thereon and in defense of such action or claim, including actual attorneys' fees. Payment shall not be a condition precedent to the enforcement of any of the Contractor's indemnity, warranty and guaranty obligations.

**Section 14.11 Relationship of Parties.** Contractor is an independent contractor and neither Contractor nor anyone employed by Contractor (including Subcontractors) will be deemed for any purpose to be the agent, employee, servant or representative of Owner in the performance of the Work. Contractor acknowledges and agrees that Owner will have no direction or control over the means, methods, procedures or manner of the Work performed by Contractor, any Subcontractor, any Mechanic, any Supplier and any of their employees, vendors or suppliers.

**Section 14.12 Severability.** If any paragraph, section, sentence, clause or phrase contained in the Contract shall become illegal, null or void, against public policy or otherwise unenforceable for any reason, or shall be held by any court of competent jurisdiction to be illegal, null or void, against public policy, or otherwise unenforceable, the remaining paragraphs, sections, sentences, clauses or phrases contained in the Contract shall not be affected thereby.

**Section 14.13 Counterparts.** For the convenience of the Parties, this Agreement may be executed in several original counterparts, each of which shall together constitute but one and the same Agreement.

**Section 14.14 Interpretation.** The Contract is deemed to be jointly prepared by all the Parties hereto and shall not be construed against any particular Party. Rather, the Contract shall be construed as if it were jointly prepared by all the Parties. Both Owner and Contractor have, with the assistance of their respective counsel, actively negotiated the terms and provisions contained in the Contract. The use of the term "including" when following any general statement, term or matter, shall not be construed to limit such statement, term or matter to the specific items or matters set forth immediately following such word or to similar items or matters, whether or not non-limiting language (such words as 'without limitation' or but not limited to, or words of similar import) is used with reference thereto, but rather shall be deemed to refer to all other items or matters that could reasonably fall within the broadest possible scope of such general statement, term or matter. Any specific requirement in the Contract that is the responsibility or obligation of Contractor that also apply to a Subcontractor is added for emphasis and is also hereby deemed to include a Subcontractor of any tier. The omission of a reference to a Subcontractor in connection with any of the Contractor's responsibilities or obligations shall not be construed to diminish, abrogate, or limit any responsibilities or obligations of a Subcontractor of any tier under the Contract Documents or the applicable subcontract.

**Section 14.15 Remedies Cumulative.** All rights and remedies of the Parties hereto are cumulative and in addition to those existing at law or in equity, and the

exercise of any one or more thereof by either Party shall not be construed to constitute a waiver of any others; and the waiver by either Party of any breach or default on the part of the other Party hereto shall not be construed to constitute a waiver of any other breach or default.

**Section 14.16 Subordination.** Contractor does hereby subordinate any and all liens or lien claims which it may now or at any time hereafter have to secure payment of any sums now or hereafter owing by Owner to Contractor under the terms hereof to the lien or liens given or created to secure the repayment of any construction loan or loans made to Owner in connection with the Project Work. Contractor shall execute promptly upon the request such other or further agreements evidencing such subordination in such form as any such Lender shall require. Nothing contained in this paragraph shall be construed to impair the lien rights that Contractor otherwise has.

**Section 14.17** All Exhibits, Riders or Addenda attached hereto are incorporated herein by reference. The capitalized terms used in the Exhibits, Riders or Addenda have the meanings ascribed to them in the Exhibits, Riders or Addenda. Otherwise, the terms are defined as stated in the Agreement and General Conditions.

**Section 14.18 Representations And Warranties.** The following representations of Contractor are material to Owner's selection of Contractor (in addition to any other representations and warranties contained in the Contract Documents), which representations and warranties shall survive the execution and delivery of this Agreement, any termination of this Agreement, the final completion of the Work and the expiration of any warranty period. Contractor shall provide such reasonable evidence necessary to support any of the following representations upon written request therefor by Owner:

**Section 14.18.1** Contractor and, to Contractor's knowledge, its Subcontractors, are financially solvent, able to pay all debts as they mature, and possess sufficient working capital to complete the Work and perform all obligations hereunder for an amount equal to no greater than the GMP;

**Section 14.18.2** Contractor is able to furnish the plant, tools, materials, supplies, and equipment, and is adequately trained and experienced management, supervision, and labor required to complete the Work and perform its obligations hereunder, and the key personnel assigned to the Project have the experience and competence to do so;

**Section 14.18.3** Contractor is authorized to do business in the City and the State of California and is properly licensed by all necessary Governing Authorities;

**Section 14.18.4** Contractor's execution of this Agreement and performance of its obligations under the Contract Documents is within Contractor's duly authorized powers, the individuals executing this Agreement on Contractor's behalf are duly authorized to sign and bind Contractor to the terms of this Agreement, and this Agreement is a valid, binding, and enforceable obligation of Contractor;

**Section 14.18.5** Contractor's management personnel assigned to the Project have visited the Project Site, are familiar with the local conditions under which the Work is to be performed, and have correlated observations with the requirements of the Contract Documents.

**Section 14.18.6** Contractor is capable of meeting the Standard of Care ;  
and

**Section 14.18.7** With respect to any Design/Build Work, Contractor is experienced in managing the effort by all participants to such components, both design professionals and others to provide a complete and coordinated design and installation.

**Section 14.19 Preliminary Matters.**

**Section 14.19.1 Delivery of Bonds.** When Contractor delivers this executed Agreement to Owner, Contractor shall also deliver to Owner such Bonds, if any, as Contractor may be required to furnish in accordance with the provisions of the Contract.

**Section 14.19.2 Copies of Documents.** Owner shall furnish to Contractor such copies of the Contract Documents as are reasonably necessary for the performance of the Work.

**Section 14.19.3 Before Commencement of Actual Construction.** Before undertaking the Work, Contractor shall carefully study and compare the Contract Documents, check and verify pertinent figures shown thereon, and take all applicable field measurements deemed necessary by Contractor to complete the Work in strict accordance with the provisions of the Contract Documents. Contractor shall carefully review and observe the Project Site and any patent conditions affecting Contractor's performance of the Work. Contractor shall promptly report in writing to Owner any conflict, error, ambiguity or discrepancy which Contractor may discover and shall request a written clarification interpretation or clarification from Architect pursuant to Section 3.3 of the General Conditions before proceeding with any Work affected thereby.



IN WITNESS WHEREOF, this Agreement is entered into by duly authorized representatives of Owner and Contractor as of the Effective Date.

**OWNER:**

HPS1 Block 50, LLC,  
a Delaware limited liability company,

By: 

Name: Kofi Bonner

Title: President

**CONTRACTOR:**

JAMES E. ROBERTS-OBAYASHI CORPORATION,  
a California corporation

By: 

Name: James E. Roberts-Obayashi

Title: President

Fed I.D. No.: \_\_\_\_\_

License No.: \_\_\_\_\_

**GENERAL CONDITIONS OF THE CONTRACT FOR  
CONSTRUCTION**

**HUNTERS POINT SHIPYARD**

**Construction for Block 50**

**BETWEEN**

**"OWNER"**

**HPS1 Block 50, LLC  
c/o Lennar Urban  
One California, Suite 2700  
San Francisco, CA 94111**

**AND**

**"CONTRACTOR"**

**James E. Roberts-Obayashi Corp.  
20 Oak Court  
Danville, California 94526**

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## GENERAL CONDITIONS OF THE CONTRACT FOR CONSTRUCTION

These General Conditions of the Contract for Construction ("**General Conditions**") are made as of \_\_\_\_\_, 2013 ("**Effective Date**") between HPS1 Block 50, LLC ("**Owner**"), and James E. Roberts-Obayashi Corporation, a California corporation ("**Contractor**"), with respect to certain improvements to be constructed on Block 50 of the Hunters Point Shipyard in the City and County of San Francisco for which the architect is Berger Detmer Ennis, Inc. ("**Architect**"). Owner and Contractor are individually referred to herein as "**Party**" and collectively as "**Parties**". Owner and Contractor agree as follows:

### ARTICLE I GENERAL PROVISIONS

#### SECTION 1.1 BASIC DEFINITIONS

**SECTION 1.1.1 The Contract Documents.** The Contract Documents are enumerated in the Guaranteed Maximum Price Agreement between the Owner and Contractor with an Effective Date of June , 2013 (as amended from time to time, the "**Agreement**"). Unless specifically enumerated in the Agreement, the Contract Documents do not include the advertisement or invitation to bid, Instructions to Bidders, sample forms, other information furnished by the Owner in anticipation of receiving bids or proposals, the Contractor's bid or proposal or portions of Addenda relating to bidding requirements, unless such documents are contained in the PLA and the VDDA.

**SECTION 1.1.2 The Contract.** The Agreement and these General Conditions form the contract for construction (the "**Contract**"), with all of the Contract Documents incorporated by reference. The Contract represents the entire and integrated agreement between the Parties hereto and supersedes prior negotiations, representations or agreements, either written or oral. The Contract may be amended or modified only by a written modification. The Contract Documents shall not be construed to create a contractual relationship of any kind (1) between Contractor and Architect or Architect's consultants, (2) between Owner and a Subcontractor or Mechanic, except that Owner is a third-party beneficiary of each of Subcontractor's subcontract, or (3) between any persons or entities other than Owner and Contractor. Architect shall, however, be entitled to performance and enforcement of obligations under the Contract intended to facilitate performance of Architect's duties.

**SECTION 1.1.3 The Work.** The terms "**Work**" and "**Scope of Work**" are synonymous and are used interchangeably to mean the furnishing of all Design/Build Work, labor, management, materials, tools, appliances, fixtures, equipment, services, supplies, supervision and administration, documentation, construction, plant and machines, transportation, fuel, Shop Drawings and Samples, as-built drawings, accessories, warranties/guarantees, manuals and all other facilities and incidentals necessary as and when required for or in connection with the construction, testing, turnover of homes, and completion of the Project and the carrying out by Contractor of all the duties and obligations for the Work imposed by the Contract Documents in a good, expeditious and workmanlike manner in accordance with the requirements of the Agreement. The Work shall also include such incidental Work items, such as coordination of the Work, which may not be expressly indicated in the Contract Documents, but which are considered Contractor's obligation to provide under normal standard construction industry customs and practices within the County in which the Project is located.

**SECTION 1.1.4 The Project and the Project Site.** The Project is the total construction of which the Work performed under the Contract Documents for Block 50 of Hunters Point Shipyard. The "Project Site" and "Site" are defined as the Block 50 of Hunters Point Shipyard.

**SECTION 1.1.5 The Drawings.** The "Drawings" are the graphic and pictorial portions of the Contract Documents showing the design, location and dimensions of the Work prepared or approved by Architect, Architect's design consultants or Owner's design consultants, generally including plans, elevations, sections, details, schedules and diagrams. Shop Drawings are not included in the definition of Drawings.

**SECTION 1.1.6 The Specifications and Design Information.** The specifications and design information contained in the Project Manual (referred to collectively, as "Specifications") in the Contract Documents are that portion of the Contract Documents consisting of the written requirements for materials, equipment, systems, standards and workmanship for the Work, and performance of related services.

**SECTION 1.1.7 Instruments of Service.** "Instruments of Service" are representations, in any medium of expression now known or later developed, of the tangible and intangible creative work performed by Architect, Architect's consultants and Owner's consultants. Instruments of Service may include, without limitation, studies, surveys, models, sketches, drawings, specifications, and other similar materials.

**SECTION 1.1.8 Exhibits.** The Exhibits referenced in these General Conditions attached to the Agreement, unless stated otherwise.

**SECTION 1.2 ADDITIONAL DEFINITIONS.** Whenever used in the Agreement or these General Conditions (including any Exhibits hereto unless otherwise defined in that Exhibit) the terms listed below have the meanings indicated, which are applicable to the singular and plural thereof:

- (a) "Affiliate" is defined as any entity related to or affiliated with Owner or in which Owner has direct or indirect ownership or control, including, without limitation, (i) any entity owned in whole or in part by Owner; (ii) any entity with more than a twenty percent (20%) interest in Owner; and (iii) any entity in which any officer, director, employee, partner, or shareholder of Owner, or any Owner Affiliate, has a direct or indirect interest or a familial relationship.
- (b) "Agency Parties" are defined as the Agency and the City and County of San Francisco, California and each of their respective supervisors, commissioners, officers and employees.
- (c) "Allowance" is defined as an amount which is specifically identified in the Schedule of Values as an Allowance for a portion of the Work for which complete specifications are not provided in the Drawings or Specifications
- (d) "Applicable Laws" are defined as (1) all applicable decisional or statutory laws, ordinances, statutes, orders, codes, and any rules, regulations, or administrative interpretations of any of the foregoing promulgated by any Governing Authority; (2) any judgment, decree, writ, or order, and (3) any permit or authorization of any nature required lawfully to undertake any portion of the Work.

- (e) **"Business Day"** is defined as Monday through Friday of each week, except that a legal holiday recognized by the U.S. Government shall not be regarded as a Business Day. References to days in the Contract Documents shall mean calendar days unless stated otherwise. When any period of time is referred to in the Contract Documents by days, it will be computed to exclude the first and include the last day of such period.
- (f) **"Construction Schedule" or "Schedule"** is defined as the schedule for the Work set forth in the Agreement, and shall explicitly take into account the impact on Contractor's prosecution of the Work of holidays and any other factors which might cause inability to perform Work on the Project and any other matter required to be considered by the Contract Documents.
- (g) **"Final Completion"** is defined as the time when Owner and Architect have agreed in writing that the Punchlist items attached to the Certificate of Substantial Completion have been fully and finally completed or corrected in accordance with the Contract Documents to Owner's reasonable satisfaction.
- (h) **"Governing Authority" or "Governing Authorities"** is defined as any governmental or quasi-governmental agency or agencies, entities, bodies, state and federal legislature, authorities, public utilities, and courts having jurisdiction over the Work or any portion thereof.
- (i) **"Knowledge"** and the term **"Recognize"** and **"Discover"** and their respective derivatives, and similar terms as used in reference to Contractor, are defined as that which Contractor knows, recognizes, and discovers or should discover in exercising the case, skill and diligence required by the Contract Documents.
- (j) **"Lender"** is defined as anyone providing financing to Owner to defray in whole or in part the costs of construction of the Project, or any portion thereof.
- (k) **"Off-Site"** is defined as areas located away from the Project Site.
- (l) **"Standard of Care"** is defined as, with respect to Contractor and any Subcontractor, that the Contractor and Subcontractors possess a high level of experience and expertise in the business administration, construction, construction management and superintendence of projects of the size, complexity, location and nature of the Project and that each Contractor and Subcontractor will perform the Work, including the Design/Build Work, with and exercise the care, skill, diligence and expertise expected of a contractor or subcontractor performing Work on such Project.
- (m) **"Stipulated Interest Rate" or "Interest"** is calculated at 2% per annum simple.
- (n) **"Substantial Completion"** is defined as the time at which the Work (or a specified part thereof) has progressed to the point where, in the opinion of Owner and Architect, the Work (or a specified part thereof) is sufficiently complete, in accordance with the Contract Documents, so that the Work (or a specified part thereof) can be utilized for the purposes for which it is intended, including, without limitation, Owner may legally occupy the premises and all services, equipment, and utilities necessary for such beneficial occupancy are operational. The terms

"substantially complete" and "substantially completed" as applied to all or part of the Work refer to Substantial Completion. If the Project is divided into multiple phases, the Construction Schedule shall be broken out by phases to show Contractor's scheduling information for each phase or buildings within a phase. Substantial Completion shall be the date a Certificate of Substantial Completion is issued as set forth above for the particular phase or building within a phase.

## SECTION 1.3 CORRELATION AND INTENT OF THE CONTRACT DOCUMENTS

**SECTION 1.3.1** The intent of the Contract Documents is to include all items necessary for the proper execution and completion of the Work by Contractor. The Contract Documents are complementary, and what is required by one shall be as binding as if required by all; performance by Contractor shall be required only to the extent consistent with the Contract Documents and reasonably inferable from them as being necessary to produce the indicated results.

**SECTION 1.3.2** Organization of the Specifications into divisions, sections and articles, and arrangement of Drawings shall not control the Contractor in dividing the Work among Subcontractors or in establishing the extent of Work to be performed by any trade.

**SECTION 1.3.3** Unless otherwise defined in the Contract Documents, words that have well-known technical or construction industry meanings are used in the Contract Documents in accordance with such recognized meanings.

**SECTION 1.3.4** Where complimentary interpretation of the Contract Documents is not possible, the order of precedence of the Contract Documents shall be as follows:

- (a) Change Orders executed by Owner and Contractor;
- (b) Shop Drawings, Submittals and RFIs, as reviewed and approved by Architect and Owner in conformance with the Contract Documents;
- (c) The Agreement;
- (d) These General Conditions;
- (e) Final Drawings and Specifications. "**Final Drawings**" are defined as are defined as the Drawings, stamped by the Architect and Architect's consultants, and approved by Owner and all applicable Governing Authorities that will be used for the construction of the Project. As between scheduled and information given on the Drawings, the schedules shall govern. Specifications shall govern Drawings where the conflict relates to quality or performance; figured dimensions shall govern scaled dimensions; and large scale Drawings shall govern small scale Drawings. When the Contract Documents are in conflict, before Contractor follows this order of precedence, Contractor must follow the procedures set forth in Section 3.3.3.

## SECTION 1.4 CAPITALIZATION

Terms capitalized in these General Conditions and the Agreement include those that are (1) specifically defined in these General Conditions and the Agreement and (2) the titles of numbered articles and identified references to sections in these documents. Capitalized terms used in these General Conditions but not otherwise defined herein shall have the respective meanings set forth in the Agreement. Capitalized terms in the Exhibits have the meanings ascribed to them in the Exhibits, but if the capitalized terms are undefined in the Exhibits, the terms have the meanings ascribed to them in the Agreement and General Conditions, with the Agreement taking precedence.

## **SECTION 1.5 INTERPRETATION**

In the interest of brevity the Contract frequently omit modifying words such as "all" and "any" and articles such as "the" and "an," but the fact that a modifier or an article is absent from one statement and appears in another is not intended to affect the interpretation of either statement. References to Articles, Sections or clauses in these General Conditions shall reference these General Conditions unless stated otherwise. Any reference to an Article or Section includes all subsections, clauses and subparagraphs of that Article or Section. Section and other headings are for the purpose of convenience of reference only and are not intended to, nor shall they, modify or be used to interpret the provisions of the Contract. The use of the words "including", "such as" or words of similar import when used with reference to any general term, statement or matter shall not be construed to limit such statement, term or matter to the specific statements, terms or matters, unless language of limitation, such as "and limited to" or words of similar import are used with reference thereto.

## **SECTION 1.6 OWNERSHIP AND USE OF DRAWINGS, SPECIFICATIONS AND OTHER INSTRUMENTS OF SERVICE**

**SECTION 1.6.1** Architect, Architect's consultants and Owner's consultants shall be deemed the authors and owners of their respective Instruments of Service, including the Drawings and Specifications, and will retain all common law, statutory and other reserved rights, including copyrights, unless otherwise stated in the contracts of the Architect, Architect's consultants or Owner's consultants. Contractor, Subcontractors, Mechanics, and Suppliers shall not own or claim a copyright in the Instruments of Service.

**SECTION 1.6.2** Contractor, Subcontractor, Mechanics and Suppliers are authorized to use and reproduce the Instruments of Service provided to them solely and exclusively for execution of the Work. All copies made under this authorization shall bear the copyright notice, if any, shown on the Instruments of Service. Contractor, Subcontractors, Mechanics and Suppliers may not use the Instruments of Service on other projects or for additions to this Project outside the scope of the Work without the specific written consent of Owner, and the authors of the Instruments of Service if ownership is with such authors.

**SECTION 1.6.3** All information, documents and electronic media furnished by Owner to Contractor (i) has been licensed to Owner free of any retention rights of Contractor, (ii) are proprietary, (iii) are furnished solely for use with regard to the Project, (iv) shall be kept confidential by Contractor except as reasonably necessary for Contractor to accomplish the Work, and (v) shall not be used by Contractor on any other project or in connection with any other person or entity, unless disclosure or use thereof is specifically authorized in writing by Owner. Owner hereby grants to Contractor a limited license to use and reproduce the Contract Documents necessary for performance of the Work. Contractor, at any time upon the request of Owner, shall immediately return and surrender to Owner all copies of any materials, records, notices, memoranda, recordings, drawings, specifications and mock-ups and any other documents furnished by Owner to Contractor. Contractor shall specifically cause all Subcontractors or any other person or entity performing services, or furnishing any materials or equipment, for the Work to warrant and represent all items set forth in this Section. Submission or distribution of documents to meet official regulatory requirements or for other required purposes is not a publication in derogation of Owner's and Architect's common law copyrights or other reserved rights.



## **SECTION 1.7 TRANSMISSION OF DATA IN DIGITAL FORM**

If the Parties intend to transmit Instruments of Service or any of the information or documentation in digital form, they shall endeavor to establish necessary protocols governing such transmissions to safeguard the integrity of the Instruments of Service.

## **ARTICLE 2 OWNER**

### **SECTION 2.1 GENERAL**

**SECTION 2.1.1** Owner shall designate in writing a representative ("Owner's Representative") who shall have express authority to bind the Owner with respect to all matters requiring the Owner's approval or authorization. References to "Owner" include its employees and Owner's Representative. Owner's Representative is currently the person designated in Section 14.2 of the Agreement. In the event Owner changes its representative during the term of this Contract, Owner shall give Contractor not less than five (5) days prior written notice of such change.

**SECTION 2.1.2** Owner shall furnish to Contractor within fifteen (15) days after receipt of a written request, information necessary and relevant for Contractor to evaluate, give notice of or enforce mechanic's lien rights. Such information shall include a correct statement of the record legal title to the property on which the Project is located, usually referred to as the Project Site, and Owner's interest therein and within five (5) days after any change in title, recorded or unrecorded.

### **SECTION 2.2 INFORMATION AND SERVICES REQUIRED OF OWNER**

**SECTION 2.2.1** Prior to commencement of the Work, Contractor may request in writing that Owner provide reasonable evidence that financial arrangements have been made to fulfill Owner's obligations under the Contract. Thereafter, Contractor may only request such evidence if (1) Owner fails to make payments to Contractor as the Contract Documents require; (2) a change in the Work materially changes the GMP; or (3) Contractor identifies in writing a reasonable concern regarding Owner's ability to make payment when due. Owner shall furnish such evidence as a condition precedent to commencement or continuation of the Work or the portion of the Work affected by a material change. After Owner furnishes the evidence, Owner shall not materially vary such financial arrangements without prior notice to Contractor, if such variance would adversely impact Contractor.

**SECTION 2.2.2** Except for permits and fees that are required of Contractor in the ordinary course of operating its business or identified in the Contract Documents, Owner shall secure and pay for necessary permits, fees, approvals, easements, assessments and charges required for construction, use or occupancy of permanent structures or for permanent changes in existing facilities.

**SECTION 2.2.3** Owner shall furnish surveys describing physical characteristics, legal limitations and utility locations for the site of the Project, and a legal description of the Project Site. Contractor shall be entitled to rely on the accuracy of information furnished by Owner but shall exercise proper precautions relating to the safe performance of the Work.

**SECTION 2.2.4** Owner shall furnish information or services required of Owner by the Contract Documents within the times set forth in the Contract Documents, if specified, or with reasonable promptness. Owner shall also furnish any other information or services under Owner's control and relevant to Contractor's performance of the Work within the time set forth in the Contract

Documents, if specified, or with reasonable promptness after receiving Contractor's written request for such information or services.

**SECTION 2.2.5** Unless otherwise provided in the Contract Documents, Owner shall furnish to Contractor one copy of the Contract Documents for purposes of making reproductions.

**SECTION 2.2.6** Owner's decisions on matters relating to aesthetic effect will be final if consistent with the intent expressed in the Contract Documents.

## **SECTION 2.3 OWNER'S RIGHT TO REJECT, STOP AND CARRY OUT THE WORK**

**SECTION 2.3.1 Right to Reject or Stop Work.** Owner may, upon notice in the form of attached **Exhibit N ("Deficiency Notice")** to Contractor, reject and/or stop the performance of any Work which does not conform to the Contract Documents, or which is not satisfactory to any Governing Authority. Upon receipt of a Deficiency Notice, Contractor shall immediately stop performance of and correct any nonconforming Work. Any costs or delays in the Contract Time associated with correcting such nonconforming work shall be the sole responsibility of Contractor, shall not be included within the Cost of the Work, and shall not constitute a reason for an extension of the Contract Time. All corrective work completed by Contractor must be approved and accepted by Owner and Architect prior to final acceptance of the Work.

**SECTION 2.3.2 Proof of Correction.** All corrective work must be supported with photographic proof or sign off by the Contractor on the Deficiency Notice, with detail of what the corrective work entailed. To the extent that photographic proof is created, Contractor shall identify the photographer, the date and time the photograph was taken, the specific location on the Project in which the photograph was taken.

**SECTION 2.3.3** If Contractor fails within ten (10) days after receipt of the Deficiency Notice to commence corrective procedures and to prosecute the same diligently to completion, Owner may do any of the following: (a) stop the Work immediately upon written notice to Contractor; (b) correct the deficiencies; and (c) assert any of its remedies available under the Contract.

**SECTION 2.3.4** If Owner elects to correct the deficiency, a Change Order shall be issued deducting (i) the reasonable cost of correcting such deficiencies plus fifteen percent (15%) of the costs incurred by Owner; (ii) any costs of the repair and replacement of the work by others caused by the deficiency, (iii) Owner's expenses and compensation for any additional services by Owner's Architect or consultants, and (iv) any other costs permitted by the Contract Documents. Owner shall withhold the amount of the Change Order from the next payment due to Contractor, but if the payment due is not sufficient to cover such amounts, Contractor shall pay the difference to the Owner within ten (10) Business Days.

**SECTION 2.3.5** If, instead of requiring correction or removal and replacement of the defective Work, Owner accepts it, Contractor shall pay all reasonable claims, costs, losses and damages attributable to Owner's evaluation of and determination to accept such defective Work and Owner shall issue a Change Order. Owner shall withhold the amount of the Change Order from the next payment due to Contractor, but if the payment due is not sufficient to cover such amounts, Contractor shall pay the difference to Owner within ten (10) Business Days.

## **ARTICLE 3 CONTRACTOR**

### **SECTION 3.1 GENERAL**

**SECTION 3.1.1** Contractor shall designate in writing a representative ("Contractor's Representative") who shall have express authority to bind Contractor with respect to all matters under this Contract. Contractor's Representative is currently the person designated in Section 14.2 of the Agreement. References to "Contractor" include its employees and Contractor's Representative. Contractor shall be lawfully licensed, if required in the jurisdiction where the Project is located.

**SECTION 3.1.2** Contractor shall perform the Work in strict accordance with the Contract Documents and Standard of Care.

**SECTION 3.1.3** Contractor shall not be relieved of obligations to perform the Work in accordance with the Contract Documents either by activities or duties of Architect in Architect's administration of the Contract, or by tests, inspections or approvals required or performed by persons or entities other than Contractor.

**SECTION 3.1.4** Contractor shall enforce strict discipline and good order among Contractor's employees and other persons carrying out the Work. Contractor shall not permit employment of unfit persons or persons not skilled in tasks assigned to them. Contractor shall immediately remove from the Project Site, any employee, Subcontractor or Mechanic reasonably considered to be unsatisfactory to Owner. If the reason for removal is Owner's good faith belief that the conduct of the employee, Subcontractor or Mechanic will lead to or has resulted in a breach of any material term or provision of the Contract Documents, Contractor shall replace such removed party and be solely responsible for all costs associated therewith, including without limitation, any increase in the Cost of the Work.

**SECTION 3.1.5 Prohibition of Consumption of Alcohol or Illegal Substances/Use of Site.** Contractor shall not permit its employees, Subcontractors, Mechanics or any other persons associated with the Work, to consume alcoholic beverages or illegal substances at the Project Site, or to perform any labor or work while under the influence of alcohol or illegal substances, and shall further prohibit pets, children and guests at the Project Site, the broadcasting of music or unnecessary noise, and all other activities that may create a nuisance or disturbance. Furthermore, Contractor shall prohibit smoking and the use of smokeless tobacco by its employees, Subcontractors, Mechanics or any other persons associated with the Work on the Project Site.

**SECTION 3.1.6 Substance Abuse Testing.** Owner shall have the right (but not the obligation) to require all employees of Contractor and all Subcontractors to be tested for substance abuse in connection with or relating to the Work. Contractor shall require that all of the employees of Contractor and Subcontractors consent to any testing required by Owner as a condition to perform any of the Work.

**SECTION 3.1.7 Parking.** Parking of all Contractor's, Subcontractor's, Mechanics' and Suppliers' workmen vehicles and delivery vehicles shall be only in areas specifically designated by Contractor unless reasonably objected to by Owner.

**SECTION 3.1.8 Use of Agency Property - Subpermit to Enter.** Pursuant to a Permit to Enter entered into between the Owner and the Agency, the Owner may be granted a Permit to Enter property adjacent or near to the Project Site for Interim Use, as defined in the Permit to Enter. Pursuant to the terms of the Permit to Enter, Owner may grant entry to third party agents, contractors,

consultants, subcontractors, suppliers, or joint venture partners, and their respective employees or agency for use of the Permit Area (as defined by the Permit to Enter) for the Interim Use (collectively, "Subpermittees") or for temporarily for visual inspections, non-invasive surveying work, deliveries, and other occasional and non-invasive entry that is incidental to the Project (collectively, together with Subpermittees, the "Representatives"). To the extent Owner enters into a Permit to Enter the Permitted Area for use on the Project with the Agency, Owner in turn grants a Subpermit to Contractor, Subcontractors, Mechanics and Suppliers, as a Subpermittee if its Work or services falls within the definition of the Interim Use, or as a Representative if its Work or services do not fall within the definition of the Interim Use and such party will enter the Permitted Area in performance of Work or services for the Project, only in accordance with the Permit to Enter.

**SECTION 3.1.8.1** In the event that Owner enters into a Permit to Enter for the Project, and Contractor or any of its Subcontractors, Mechanics, Suppliers or other persons or entities under the control of Contractor will enter the Permit Area in the performance of its Work or Services, Contractor agrees, and shall require its Subcontractors, Mechanics, Suppliers and all other persons or entities under the control of Contractor, to strictly comply with all applicable terms of the Permit to Enter, including but not limited to any indemnity obligations, as a condition precedent to entry into the Permit Area, and not take any action that may cause Owner to be in default of the such Permit to Enter.

**SECTION 3.1.9 Delivery of Union Trust Fund Report.** If Contractor is a member or becomes a member of any labor union either prior to or during the term of the Agreement, Contractor shall, prior to commencement of any Work at Contractor's sole expense, obtain and deliver to Owner, the union trust fund report. Prior to final payment to Contractor, Contractor shall deliver to Owner lien releases from all union trust funds to which Contractor was required to make contributions in the performance of the Work; provided, however, that if Contractor is unable to obtain any such release, Contractor shall re-affirm its obligations to obtain the release of any lien, including liens by any trustee for any labor union or adequate collateral at Contractor's sole expense. Contractor's delinquency in the payment or payments of any required contributions to any union trust fund shall be a material default under the Agreement.

**SECTION 3.1.10 Compliance with Laws.** Contractor shall and shall require all Subcontractors to comply with and give notice as required by all Governing Authorities and Applicable Laws concerning the Work and the Project.

**SECTION 3.1.11** Contractor specifically warrants and agrees it: (i) shall not knowingly hire or continue to employ aliens not authorized to work in the United States; (ii) has and shall continue to verify the employment documentation specified in the Immigration Reform and Control Act of 1986 ("Immigration Act"); and (iii) has and shall properly complete and retain the Immigration and Naturalization Service's Form I-9 for all employees of Contractor covered by the Immigration Act performing any Work. Should Contractor fail to comply with this Section, Owner shall have the right to rescind the Contract, declare Contractor in default under the Contract, or both, and as a result Owner will be entitled to all direct, indirect, consequential, impact, or other costs, expenses, or damages, including without limitation, costs, lost profits, or attorneys' fees arising out of or as a result of Contractor's breach. Contractor shall use reasonable care and diligence in ensuring that all Subcontractors comply with the Immigration Act, and the requirements of this provision shall be included in all subcontract agreements used with respect to the Project.

  
Contractor's Initials

**SECTION 3.1.12** Contractor shall only employ or use labor for the Work capable of working harmoniously. Any slowdown or stoppage to the Work caused by (1) a labor dispute or (2) problem arising or related to the acts or omissions of Contractor's employees or Subcontractors, shall be solely Contractor's responsibility and shall not be included within the Cost of the Work nor a change in the Contract Time. Contractor must timely resolve the labor dispute or problem. Contractor is advised that the Project may be subject to certain union or trade agreements, including but not limited to the PLA. Owner reserves the right to disapprove, or to require the removal of any person or organization which is being considered for, or has received an award to perform all or a portion of the Work but has failed to demonstrate the willingness or ability to follow Owner's policy of maintaining harmonious relationships. Regardless of the expiration of any collective bargaining agreement which may affect Contractor in any of its activities with respect to the Work, Contractor is obligated without regard to any labor union or other job actions to man the job and properly and perform the Work in a diligent and timely manner. Upon notification of expected or actual labor disputes or job disruption arising out of any such collective bargaining negotiations, the expiration of any union or trade agreement or any other cause, Contractor and its Subcontractors shall cooperate with Owner concerning any legal, practical, or contractual actions to be taken by Owner in response thereto and shall perform any actions requested by Owner to eliminate, neutralize, or mitigate the effects of such actions on the progress of the Work and the impact of such actions on public access to Owner's facilities. It is Contractor's obligation at its own cost to take all steps available to prevent any persons performing the Work from engaging in any disruptive activities such as strikes, picketing, slowdowns, job actions, or work stoppages of any nature or ceasing to work due to picketing or other similar activities, which steps shall include, without limitation, execution of an appropriate project agreement with all appropriate unions prohibiting all such activities which may affect the Project in any manner. Nothing in this Section 3.1.12 obviates Contractor's obligations to strictly comply with the terms and condition under the PLA.

**SECTION 3.1.13 Gifts.** Because Owner appreciates the efforts of its contractors and subcontractors and their employees, Owner periodically gives its contractors, subcontractors and their employees customary and nominal tokens of its appreciation, such as, without limitation, logo and non-logo apparel, rounds of golf, spa days, meals, materials and other gifts or outings ("Customer Appreciation Gifts"). Contractor acknowledges and agrees that Owner's giving of Customer Appreciation Gifts to Contractor, Subcontractors or their employees is customary in the industry and does not constitute an attempt to improperly influence them and does not give rise to any claims for civil or criminal misconduct. Owner fully understands that Contractor, Subcontractor and their employees will be under no obligation to Owner other than those contained in the Contract Documents. In order to ensure that Contractor is aware of this practice, Contractor expressly agrees that Owner may, at Owner's sole discretion, without any obligation on the part of Owner and without further notice to Contractor, provide similar tokens of appreciation to Contractor, Subcontractors or their employees without the need to obtain additional written or verbal consent from Contractor.

Excluding Customer Appreciation Gifts from Owner, neither Contractor, nor any of its Subcontractors or Suppliers shall, without specific written authorization of Owner, give to or receive from any person or entity (including, without limitation, any officer or employee of any government department, agency or instrumentality) any commission, fee, rebate, gift or loan of significant cost of value, in connection with, or as a result of Contractor's Work, to influence any decision or to gain any other advantage for Owner, Contractor or Subcontractor. Contractor shall not, without written approval of Owner: (a) enter into any business arrangement with any partner or employee of Owner (or its Affiliates) other than one acting in a capacity as a representative of Owner (or its Affiliates) in accordance with the Contract, or (b) engage in any employment or

enter into any contract or agreement that conflicts with Contractor's obligations under this Section 3.1.13. In the event of a violation of this Section 3.1.13, Contractor shall pay to Owner any and all amounts received by Contractor or its partner, director, employee, agent, or Subcontractor, however, such payment shall not limit, or operate as a waiver of, any other legal or equitable rights which Owner may have against Contractor at law, in equity, or under the Contract.

## **SECTION 3.2 WORK PERFORMED BY CONTRACTOR**

**SECTION 3.2.1** Contractor must competitively bid any trade Work that Contractor wishes to perform with Contractor's own forces, or through a Contractor Affiliate (as defined below), and Contractor shall strictly comply with all of the terms and conditions of the PLA and VDDA, including any bid requirements. If the terms and conditions of the PLA or VDDA are not controlling to the portion of the Work in which the Contractor wishes to perform with its own forces or through a Contractor Affiliate, Contractor must obtain at least two (2) additional responsive bids from responsible subcontractors acceptable to Owner. Contractor, or a Contractor Affiliate, shall be permitted to perform such trade Work only if (i) Owner consents after full disclosure in writing by Contractor to Owner of the affiliation, and (ii) Owner approves in writing any subcontract, contract, purchase order, agreement, or other arrangement between Contractor and such Contractor Affiliate. Should Contractor itself or a Contractor Affiliate be awarded the competitively bid Work, the bid amount will be included in the Schedule of Values in the same manner as if the Work were awarded to an independent subcontractor. The term "Contractor Affiliate" is defined as any entity related to or affiliated with Contractor or in which Contractor has direct or indirect ownership or control, including, without limitation, (i) any entity owned in whole or in part by Contractor excluding any publicly traded company; (ii) any entity with more than a twenty percent (20%) interest in Contractor; and (iii) any entity in which any officer, director, employee, partner, or shareholder of Contractor, or any Contractor Affiliate, has a direct or indirect interest or a familial relationship.

## **SECTION 3.3. REVIEW OF CONTRACT DOCUMENTS AND FIELD CONDITIONS BY CONTRACTOR**

**SECTION 3.3.1** Contractor represents and warrants that Contractor has (a) evaluated the nature and location of the Project Site and the conditions and limitations under which the Work is to be performed; (b) evaluated the character and quantity of the labor, materials, equipment, and facilities necessary to timely complete the Work in accordance with the scheduling requirements of Article 2 and the cost commitments of Article 5 of the Agreement, and (c) determined the current status of the general and local conditions relating to the Work, including any factors that may affect Contractor's performance of the Work within the Contract Time, including, without limitation, (i) the layout and nature of the Project Site and surrounding areas, (ii) generally prevailing climatic conditions, including, without limitation, the number of days of anticipated rainfall that will exceed one-tenth (.10) inch, that are likely to affect Contractor's ability to prosecute the Work, (iii) anticipated labor supply and costs, (iv) the environmental constraints on the Project and (v) other matters that a general contractor skilled and experienced in this type of Project would consider. If the Scope of the Work involves demolition, modifications or remodeling of any existing structure or other man-made feature on the Project Site, Contractor has also (A) reviewed all as-built and record drawings, plans and specifications provided to Contractor by Owner, and (B) thoroughly inspected the structures and man-made features to be modified, demolished or remodeled prior to signing the Agreement. Contractor's breach of any of the foregoing representations and warranties shall constitute a material default of the Contract.

**SECTION 3.3.2** Contractor acknowledges its continuing duty to exercise Contractor's Standard of Care in its review and evaluation of the Contract Documents in identifying any reasonably discoverable corrections or changes to the Contract Documents required as a result of compliance with any Applicable Laws applicable to the Work, including but not limited to the building standards set forth in California Civil Code section 895 et. seq., and the Standard of Care. If Contractor becomes aware or should have become aware that the Contract Documents are in conflict with any Applicable Laws or any generally accepted industry standards, Contractor shall immediately request clarification in writing from Architect in the form of a written Request for Information ("RFI"). If Architect fails to clarify such discrepancy within the time period set forth in the Specifications, or if no time period is specified, within a reasonable time, Contractor shall notify Owner, in writing. If Owner fails to respond within fifteen (15) days, Contractor shall proceed with the Work in a manner which is compliant with the relevant Applicable Laws.

**SECTION 3.3.3** Contractor acknowledges its continuing duty to exercise Contractor's Standard of Care in its review and evaluation of the Contract Documents including identifying any reasonably discoverable discrepancies among the Contract Documents. If Contractor Discovers or should have Discovered that any of the Contract Documents are in conflict with each other, Contractor shall immediately request clarification in writing from Architect in the form of a written RFI. If Architect fails to clarify such discrepancy within the time period set forth in the Specifications, or if no time period is specified, within a reasonable time, Contractor shall notify Owner, in writing. If Owner fails to respond within fifteen (15) days, Contractor shall proceed with the Work in a manner which is consistent with the order of precedence set forth in Section 1.3.4.

**SECTION 3.3.4** Contractor shall, before starting each portion of the Work, carefully study and compare the various Contract Documents relative to that portion of the Work, as well as the information furnished by Owner pursuant to Section 2.2.3, shall take field measurements of any existing conditions related to that portion of the Work and shall observe any conditions at the Project Site affecting it. If Contractor becomes aware of any discrepancies with the field conditions and the Contract Documents, Contractor shall, within five (5) days of discovering or learning of the conflict, request clarification in writing from Owner and Architect in an RFI. If Architect fails to clarify such discrepancy within the time period set forth in the Specifications, or if no time period is specified, within a reasonable time, Contractor shall notify Owner, in writing. If Owner fails to respond within fifteen (15) days, Contractor shall proceed with the Work in a manner which meets the intent of the Construction Documents.

**SECTION 3.3.5** Contractor shall perform all of the Work described in any responses to RFIs in an expeditious manner so as not to delay the Project.

**SECTION 3.3.6** It is recognized that Contractor's review pursuant to Sections 3.3.2, 3.3.3, and 3.3.4 is made in Contractor's capacity as a contractor and not as a licensed design professional unless otherwise specifically provided in the Contract Documents. Except for Design/Build Work, nothing contained in the Contract Documents is intended to or shall be construed to impose on Contractor any responsibility to perform any design of any portion of the Project or otherwise provide any design services. Contractor means and methods shall remain the responsibility of Contractor as set forth in Section 3.4 et seq.

**SECTION 3.3.7** If Contractor believes that additional cost or time is involved because of clarifications or instructions Architect issues in response to Contractor's notices or RFI pursuant to Sections 3.3.2, 3.3.3, and 3.3.4, Contractor shall make claims as provided in Articles 8 and 9. If

Contractor fails to perform the obligations of Sections 3.3.2, 3.3.3 and 3.3.4, Contractor shall pay such costs and damages to Owner as would have been avoided if Contractor had performed such obligations. If Contractor does not perform those obligations, Contractor shall be liable to Owner for damages resulting from errors, inconsistencies, omissions or differences (i) in the Contract Documents and Applicable Laws, (ii) among or between any of the Contract Documents; and/or (iii) between field measurements or site conditions and the Contract Documents.

**SECTION 3.3.8** Contractor's failure to request clarification of any inadequacy, inconsistency, omission or conflict Known or Discovered by Contractor or which Contractor should have Known or Discovered in the exercise of Contractor's Standard of Care shall not relieve Contractor of its obligation to perform in accordance with the Contract Documents.

**SECTION 3.3.9** Contractor shall carefully preserve any and all benchmarks, monuments, survey markers, and stakes, so far as possible. Should any stakes or points be removed or destroyed unnecessarily by any act or omission of Contractor, Subcontractor or Mechanics, they shall be reset at Contractor's sole expense and shall not be a Cost of the Work.

## **SECTION 3.4 SUPERVISION AND CONSTRUCTION PROCEDURES**

**SECTION 3.4.1** Contractor shall supervise and direct the Work, using Contractor's best skill and attention. Contractor shall be **solely responsible** for and have control of (i) all construction means, methods, techniques, sequences and procedures; (ii) coordinating all portions of the Work; and (iii) coordinating, implementing and enforcing all safety programs and precautions with respect to the Work. All services rendered by Contractor shall be performed by or under immediate supervision of persons possessing expertise in the discipline of the services being rendered. In no event shall Owner, Architect or Owner's consultants have control over, charge of, or any responsibility for construction means, methods, techniques, sequences or procedures or for safety precautions and programs in connection with the Work, notwithstanding any rights granted to Owner, Architect or Owner's consultants in the Contract Documents.

**SECTION 3.4.2** Contractor shall be responsible for the coordination of all Subcontractor's and Mechanic's efficient utilization of all in-wall or in-ceiling spaces, utility trenching, or other areas of the Project Site in which physical subsystems are to be located in accordance with the Standard of Care. Notwithstanding the foregoing, Contractor shall not be liable for any additional costs incurred as a result of the Architect's or other consultants' coordinated plans, designs, and specifications failing to provide sufficient physical space in such locations for the construction or placement of all such trades' required elements constructed or installed in accordance with this Section 3.4 and the remainder of the Contract Documents, except as stated in Sections 3.3.2, 3.3.3 and 3.3.4 and for the Design/Build Work.

**SECTION 3.4.3** If the Contract Documents give specific instructions concerning construction means, methods, techniques, sequences or procedures, Contractor shall evaluate the jobsite safety thereof and, except as stated below, shall fully and solely responsible for the jobsite safety of such means, methods, techniques, sequences or procedures. If Contractor determines that such means, methods, techniques, sequences or procedures may not be safe, Contractor shall give timely written notice to Owner and Architect and shall not proceed with that portion of the Work without further written instructions from Owner and/or Architect. If Contractor is then instructed, in writing, to proceed with the required means, methods, techniques, sequences or procedures without acceptance of changes proposed by Contractor, Owner and Architect, respectively, shall be responsible for any loss or damage arising solely from their respective Owner-required or Architect's-required means,



methods, techniques, sequences or procedures, otherwise Contractor is solely responsible for any loss or damages.

**SECTION 3.4.4** Contractor shall be responsible to Owner for acts and omissions of employees and agents of Contractor, Subcontractors, Mechanics and all other persons or entities performing portions of the Work for or on behalf of Contractor, Subcontractors or Mechanics.

**SECTION 3.4.5 Emergencies.** In an emergency affecting (or believed by Contractor, in good faith, to affect) the safety of persons or property, Contractor, without special instructions or authorization from Owner, shall act immediately at its own discretion to prevent such threatened loss or injury and shall have the authority to close down its operations until any unsafe condition has been corrected. Contractor shall immediately notify Owner, verbally and in writing, of the action taken and the status of the emergency. Any extension of the Contract Time claimed by Contractor on account of the emergency, when such emergency is not caused by the act or omission of Contractor or any Subcontractors or Mechanics, shall be determined as provided in Article 9.

## **SECTION 3.5 LABOR, MATERIALS, AND SUBSTITUTIONS**

**SECTION 3.5.1** Unless otherwise provided in the Contract Documents, Contractor shall provide and pay for labor, materials, equipment, tools, construction equipment and machinery, water, heat, utilities, transportation, and other facilities and services necessary for proper execution and completion of the Work, whether temporary or permanent and whether or not incorporated or to be incorporated in the Work.

**SECTION 3.5.2** Contractor shall furnish such temporary structures required to aid in the construction of the Project, whether above or below grade as necessary to provide access, support and protection for the facilities under construction, as well as to assure the safety of the workers and the public. Contractor shall provide and maintain in safe operational condition all scaffolding, staging, bracing, shoring, underpinning, hoisting, planks, ladders, rigging, barricades, protective devices and coverings, and all other associated equipment and accessories, as well as for the safe transportation, unloading, erection and removal of same from the Project Site. Such temporary structures shall be dismantled and removed when the work became self-supporting or completed, unless intended to become incorporated into the finished Work. No construction trailers, or other temporary office facilities, shall be placed or maintained at or in the vicinity of the Project Site until Contractor and Owner have mutually agreed to the appearance and location of such structures. Upon completion of the Work, Contractor shall remove from the Project Site all temporary structures unless agreed upon with Owner to maintain temporary structures or construction trailers to use for future work.

**SECTION 3.5.3 Material.** If required by Owner, Contractor shall furnish evidence satisfactory to Owner as to the kind and quality of materials and equipment used in the performance of the Work. Whenever a product is specified in accordance with a Federal Specification, an ASTM Standard, an American National Standards Institute Specification, or other Association Standard, Contractor shall present an affidavit from the manufacturer when requested by Architect or required in the Specifications, certifying that the product complies with the particular standard or specification. When requested by Architect or otherwise specified, supporting test data shall be submitted to substantiate compliance. Whenever a product is specified or shown by describing proprietary items, model numbers, catalog numbers, manufacturers, trade names, or similar reference, no substitutions in material or methods of installation may be made unless accepted prior to execution of the Agreement or if accepted as a Change Order in accordance with Article 8.

**SECTION 3.5.4 Substitutions.** Contractor may only make substitutions with the consent of Owner, after evaluation by Architect and in accordance with a Change Order. Contractor must strictly comply with the product substitution procedures set forth in the Specifications.

**SECTION 3.5.4.1** Substitutions and alternates will be considered only under one or more of the following conditions: (i) the proposal is required for compliance with interpretation of any Applicable Laws or insurance regulations then existing; (ii) specified products are unavailable through no fault of Contractor; (iii) subsequent information discloses the inability of specified products to perform properly or to fit in the designated space; (iv) the manufacturer/fabricator refuses to certify or guarantee the performance of the specified product as required; or (v) when in the judgment of Owner or Architect, a substitution would be substantially in Owner's best interests, in terms of cost, time or other considerations.

## **SECTION 3.6 MATERIALS FURNISHED BY OTHERS/PRIOR ORDERED MATERIAL**

**SECTION 3.6.1** If the Work includes installation of materials or equipment furnished by anyone other than by or through Contractor, Contractor shall examine, inspect, unload, inventory and accept in writing the items so provided and thereupon reload as necessary, handle, store and install the items with skill and care so as to ensure their satisfactory installation and operation except if the materials or equipment relate to work not being performed by Contractor. After Contractor makes its inventory of materials and equipment furnished by others, and prior to commencing any installation, Contractor shall provide Owner with a written inventory of all missing or damaged materials or equipment, if any.

**SECTION 3.6.2** Contractor accepts assignment of, and liability for, all purchase orders and other agreements for procurement of materials and equipment that are identified as part of the Contract Documents. Contractor shall be responsible for such pre-purchased items, if any, as if Contractor were the original purchaser. The Contract Sum includes, without limitation, all costs in connection with delivery, storage, insurance, installation and testing of items covered in any assigned purchase orders or agreements. All correction and warranty obligations under the Contract Documents shall also apply to any pre-purchased items.

## **SECTION 3.7 ALLOWANCES**

**SECTION 3.7.1** Contractor shall include in the Contract Sum all Allowances. Except as specifically identified in the Schedule of Values, there are no other Allowances. All materials covered by Allowances must be purchased by Contractor within sixty (60) days from the Date of Commencement, unless Owner agrees in writing. Items covered by Allowances shall be supplied by such persons or entities as Owner may direct, but Contractor shall not be required to employ persons or entities to whom Contractor has reasonable objection. To the extent that Subcontractors' bids contain any qualifications, those qualifications are not Allowances, but are alternates for which the Subcontractor must provide cost of such alternates as well as request substitution as required under the Specifications and these General Conditions.

**SECTION 3.7.2** Contractor has included Allowances in the Guaranteed Maximum Price. Said Allowances shall be for the scope of Work as listed in the Contract Documents and shall be understood to be an estimate of the Cost of such Work.

**SECTION 3.7.3** Unless otherwise provided in the Contract Documents:

(a) Allowances shall cover the cost to Contractor of unloading and handling, labor, installation materials and equipment delivered at the site and all required taxes, less applicable trade discounts;

(b) Contractor's Fee for stated Allowance amounts shall be included in the GMP, but not in the Allowances;

(c) Whenever costs are more than or less than Allowances, the Contract Sum shall be adjusted accordingly by Change Order. The amount of the Change Order shall reflect the difference between actual costs and the Allowances set forth in the Schedule of Values.

**SECTION 3.7.4** Materials and equipment under an Allowance shall be selected by Architect and/or Owner with reasonable promptness.

### **SECTION 3.8 PROJECT MANAGER, SUPERINTENDENT AND STAFFING**

**SECTION 3.8.1** Contractor shall furnish only skilled and properly trained staff for the performance of the Work. The key members of Contractor's staff shall be persons agreed upon with Owner and identified in the "Schedule of Key Personnel" attached as Exhibit O.

**SECTION 3.8.2** The Key Personnel identified in Exhibit O shall not be changed without the written consent of Owner (consent shall not be unreasonably withheld or delayed), unless such person becomes unable to perform any required duties due to death, disability, transfer, or termination of employment with Contractor. If any Key Personnel become incapable of performing in the capacity described in Exhibit O, Contractor shall promptly recommend a mutually acceptable substitute at no additional cost.

**SECTION 3.8.3** Contractor shall keep at least one competent superintendent who shall be in attendance at the Project Site during performance of the Work, an adequate number of assistants thereto, and shall assign a competent project manager to the Project. Both the superintendent and the project manager shall represent Contractor and communications given to and by the project manager or superintendent shall be deemed given to Contractor and shall be binding as to Contractor. Notice from Owner or Architect to such superintendent or project manager in the manner provided by the Contract in connection with the Work shall be considered notice to Contractor.

### **SECTION 3.9 CONTRACTOR'S CONSTRUCTION SCHEDULES**

**SECTION 3.9.1** Contractor, within ten (10) days after execution of the Agreement, shall prepare and submit for Owner and Architect a Construction Schedule for the Work, in a form acceptable to Owner. The schedule shall be a critical path method ("CPM") schedule identifying the critical path. Contractor shall deliver to Owner and Architect an electronic version of the Construction Schedule with the hard copy. The Construction Schedule shall also (i) provide a graphic representation of all activities and events that will occur during performance of the Work; (ii) identify each phase of construction and occupancy; (iii) be consistent with the mutually agreed dates of the major components of the Work set forth in Exhibit F-1 critical to ensuring the timely and orderly completion of the Work ("Milestone Dates" or "Milestones"); (iv) include the Budgeted Cost for each sub-trade activity noted in the Construction Schedule; and (v) have incorporated the activity durations for each sub-trade activity. The Construction Schedule shall be constructed to show the order in which Contractor proposes to carry out the Work, to indicate manpower, materials, and equipment. The Construction

Schedule takes into account the anticipated rainfall that will be in excess of one-tenth (.10) inch at the Project Site during the Contract Time. If not accepted by Owner, the Construction Schedule shall be revised promptly and resubmitted by Contractor. Upon final review and acceptance by Owner of the Milestone Dates, the Construction Schedule pursuant to this Section, shall be countersigned by Owner and Contractor and shall, upon execution, be deemed part of the Contract Documents and shall be attached to the Agreement as Exhibit F.

**SECTION 3.9.2** The Construction Schedule shall not exceed the Contract Time.

**SECTION 3.9.3** Contractor shall monitor the progress of the Work for conformance with the requirements of the Construction Schedule and shall promptly advise Owner of any delays or potential delays in accordance with Article 9. The Construction Schedule shall be updated by Contractor to reflect actual conditions in the "Monthly Progress Reports" and delivered to Owner pursuant to a mutually agreed schedule. The Monthly Progress Reports shall include a reasonable number of photographs showing progress of the Work and taken since the last report and shall note: (a) start and finish dates for all activities started or finished during the report period; (b) the current status of all activities reported as being in progress in the last update report and, if completed during the current report period, the date of actual completion and for those still in progress, the estimated remaining time duration; (c) activities that need to be re-sequenced, added, deleted or modified to add clarification, to reflect a change in plan of operation, or to maintain required schedule detail for proper monitoring and control; and (d) any information that must be incorporated into the Construction Schedule to reflect delays or changed conditions that influence the Construction Schedule and progress of the Project. The Monthly Progress Report should also identify any problems with respect to the Construction Schedule, the reasons for cost or schedule variances, the impact to the immediate task and to the total Project. If a delay is involved, Contractor shall provide Owner with Notice of such delay pursuant to Section 9.2. If any Monthly Progress Report indicates any delays, for whatever reason caused, Contractor shall propose an affirmative plan to correct the delay, including overtime and/or additional labor, if necessary. In no event shall any Monthly Progress Report constitute notice pursuant to Article 9 for an adjustment in the Contract Time, any Milestone Date, or the Contract Sum unless any such adjustment is agreed to by Owner in writing and authorized pursuant to Change Order. If Contractor fails to deliver any Monthly Progress Report with the updated Construction Schedule and the accompanying supporting information required by this Section by the mutually-agreed delivery date, then Contractor shall deliver the Monthly Progress Report within fifteen (15) days after Owner's written notice to Contractor of such failure by Contractor. If Contractor thereafter fails to deliver the Monthly Progress Report with the updated Construction Schedule to Owner within such fifteen (15) day period, then Owner may withhold payment of Contractor's next due Monthly Progress Payment until Contractor has delivered to Owner a Monthly Progress Report that complies with the requirements of this Section.

**SECTION 3.9.4** If Owner reasonably determined that the performance of the Work, as of a Milestone Date, has not progressed or reached the level of completion required by the Contract Documents for reasons other than Permissive, Weather, or Owner Delays (as defined in Article 9), then prior to Contractor's submission of the next Application for Payment (but in no event less than five (5) days after Contractor's receipt of notice from Owner), Contractor shall submit a recovery schedule for Owner's review. If not incorporated into the recovery schedule, Owner may require Contractor to take corrective measures necessary to expedite the progress of construction, including, without limitation, (i) working additional shifts or overtime, (ii) supplying additional manpower, equipment, and facilities, and (iii) other similar measures (collectively, "Extraordinary Measures"). Such Extraordinary Measures shall continue until the progress of the Work complies with

the stage of completion required by the Contract Documents. Owner's right to require Extraordinary Measures is solely for the purpose of ensuring Contractor's compliance with the Construction Schedule. Contractor shall not be entitled to an adjustment in the Contract Sum in connection with Extraordinary Measures required by Owner. Owner may require Extraordinary Measures as frequently as Owner reasonably deems necessary to ensure that Contractor's performance of the Work will comply with any Milestone Date or completion date set forth in the Contract Documents. If Contractor fails to take any action required under this Section 3.9.4 within a reasonable period of time, Owner may take any required actions to restore the progress of the Work to the Schedule required by the Contract Documents and deduct the entire costs thereof from amounts due or to become due Contractor.

**SECTION 3.9.5** Contractor shall have the right to decide the time and order in which portions of the Work shall be installed and performed, and the relative priority of the Work to ensure the timely and orderly performance of the Work, such that the Work is completed within the Contract Time.

### **SECTION 3.10 SUBMITTALS, SHOP DRAWINGS, PRODUCT DATA, SAMPLES AND MOCK-UPS**

**SECTION 3.10.1 "Shop Drawings"** are drawings, diagrams, schedules and other data specially prepared for the Work by Contractor or a Subcontractor, Mechanic, Supplier, manufacturer or distributor to illustrate some portion of the Work.

**SECTION 3.10.2 "Product Data"** are illustrations, standard schedules, performance charts, instructions, brochures, diagrams and other information furnished by the Contractor or a Subcontractor, Mechanic, Supplier, manufacturer or distributor to illustrate materials or equipment for some portion of the Work.

**SECTION 3.10.3 "Samples"** are physical examples that illustrate materials, equipment or workmanship and establish standards by which the Work will be judged.

**SECTION 3.10.4 "Mock-ups"** are scaled or full-scale models or other representations of finished systems, subsystems, or integrated samples depicting the fit, finish, quality, or other aspect of any portion of the Work determined by Owner to be necessary or desirable to assist in prosecution of the Work.

**SECTION 3.10.5 "Submittals"** include Shop Drawings, Product Data, Samples, Mock-ups, and similar materials.

**SECTION 3.10.6** Submittals are not Contract Documents, unless approved pursuant to the provisions of Section 3.10. Their purpose is to demonstrate the way by which Contractor proposes to conform to the information given and the design intent expressed in the Contract Documents for those portions of the Work for which the Contract Documents require Submittals. Review by Architect is subject to the limitations of Article 6. Informational submittals upon which Architect is not expected to take responsive action may be so identified in the Contract Documents. Submittals that are not required by the Contract Documents may be returned by Architect without action.

**SECTION 3.10.7** Contractor is required to timely prepare and submit all Submittals in such sequence and with sufficient lead time so as to cause no delay in the Work and the Submittals must be in conformance with the requirements of the Specifications. In order to provide Owner, Architect and

Owner's consultants' appropriate time to review the Submittals of Contractor, Contractor shall provide Owner with a Submittal Schedule within ten (10) days after the issuance of the Notice to Proceed. The Submittal Schedule shall (1) be coordinated with Contractor's Construction Schedule, and (2) allow Architect or Owner's consultants reasonable time to review the Submittals. If Contractor fails to submit a Submittal Schedule, Contractor shall not be entitled to any increase in Contract Sum or extension of Contract Time based on the time required for review of Submittals.

**SECTION 3.10.8** By submitting Submittals, Contractor represents to Owner and Architect that Contractor and its Subcontractor, Mechanic or Supplier has (1) reviewed and approved them, (2) determined and verified materials, field measurements and field construction criteria related thereto, or will do so and (3) has checked and coordinated the information contained within such Submittals with the requirements of the Work and of the Contract Documents. Before submitting Submittals to the Architect, Contractor is required to date-stamp and initial all of the Submittals.

**SECTION 3.10.9** Contractor shall perform no portion of the Work for which the Contract Documents require submittal and review of Submittals until the respective Submittal has been approved by Architect. The Work shall be in accordance with approved Submittals, provided Section 3.10.10 has been followed.

**SECTION 3.10.10** To the extent Contractor submits Submittals that do not strictly conform to the Contract Documents, it must (a) request a substitution pursuant to the provisions of these General Conditions and the Specifications and (b) specifically demarcate any and all deviations from the Contract Documents in each of the Submittals. If Contractor fails to perform the requirements set forth in (a) and (b) herein, it will be solely liable for any costs, damages or expenses as a result of such failure, regardless of whether Architect or any other consultant approves the Submittal. Contractor shall not be relieved of responsibility for errors or omissions in Submittals by Architect's or Owner's consultant's review thereof, unless Contractor has separately and specifically informed Architect or Owner's consultant, in writing, of such deviation at the time of submission of Submittal and Architect or Owner's consultant has given written approval or taken no exception to the specific deviation.

**SECTION 3.10.11** Contractor shall direct specific attention, in writing or on resubmitted Submittals, to revisions other than those requested by Architect on previous submittals. In the absence of such written notice, Architect's approval of a resubmission shall not apply to such revisions.

**SECTION 3.10.12** The review and acceptance of the Submittals by Owner or Architect shall not be deemed an approval or acceptance of Contractor's means, methods, techniques, sequences or procedures related to the Work or conformance with Applicable Laws. Contractor shall be solely liable for all such matters.

## **SECTION 3.11 DOCUMENTS AND SAMPLES AT THE SITE**

**SECTION 3.11.1** Contractor shall maintain at the Project Site one copy of all Drawings, Specifications, Addenda, approved Shop Drawings, Change Orders, Submittals, and other modifications (collectively, the "As-Builts"). Contractor shall neatly, cleanly and concisely maintain the As-Builts, updating them at least once a month, showing locations of all equipment and materials as well as revisions and modifications to details affecting the Work and the Plans, Drawings, and Specifications therefore. Contractor shall maintain a file of the Design/Build Work in such form and format as shall be reasonably acceptable to Owner and Architect. All of these documents shall be delivered to Owner upon completion of the Work as a record of the Work as constructed.

## **SECTION 3.12 CUTTING AND PATCHING**

**SECTION 3.12.1** Contractor shall be responsible for cutting, fitting or patching required to complete the Work or to make its parts fit together properly. All areas requiring cutting, fitting and patching shall be restored to the condition existing prior to the cutting, fitting and patching, unless otherwise required by the Contract Documents.

**SECTION 3.12.2** Contractor shall not damage or endanger a portion of the Work or fully or partially completed construction of Owner or separate contractors by cutting, patching or otherwise altering such construction, or by excavation. Contractor shall not cut or otherwise alter such construction by Owner or a separate contractor except with written consent of the Owner and of such separate contractor; such consent shall not be unreasonably withheld. Contractor shall not unreasonably withhold from Owner or a separate contractor Contractor's consent to cutting or otherwise altering the Work.

## **SECTION 3.13 ROYALTIES, PATENTS AND COPYRIGHTS**

**SECTION 3.13.1** Contractor shall pay all royalties and license fees for Design/Build Work (if the Work includes Design/Build Work) and Submittals. Contractor shall indemnify and defend Owner suits or claims for infringement of copyrights and patent rights of the Design/Build Work (if the Work includes Design/Build Work), Submittals and shall hold Owner and Architect harmless from loss on account thereof, but shall not be responsible for such defense or loss when a particular design, process or product of a particular manufacturer or manufacturers is required by the Contract Documents or where the copyright violations are contained in Drawings, Specifications or other documents prepared by Owner or Architect. However, if Contractor has knowledge that the required design, process or product is an infringement of a copyright or a patent, Contractor shall be responsible for such loss unless such information is promptly furnished to Architect and Owner.

## **ARTICLE 4 WARRANTY**

### **SECTION 4.1 GENERAL**

**SECTION 4.1.1** Contractor warrants to Owner that the Work shall be executed in a safe, sound and workmanlike manner. Contractor warrants that the Work will conform and be in accordance with (i) the Standard of Care; (ii) the requirements of the Contract Documents; and (iii) Applicable Laws including the Building Standards set for in California Civil Code section 895 et seq. Contractor warrants that materials will be free from defects, except for those inherent in the quality of the Work the Contract Documents require or permit. Contractor warrants that all workmanship shall be first class and of the best of its kind, and all materials used in the Work shall be furnished in ample quantities to facilitate the proper and expeditious execution and completion of the Work. Work, materials, or equipment not conforming to these warranties and requirements may be considered defective. Contractor's warranty excludes remedy for damage or defect caused by abuse, alterations to the Work not executed by Contractor, improper or insufficient maintenance, improper operation, or normal wear and tear and normal usage. If required by Owner, Contractor shall furnish satisfactory evidence as to the kind and quality of materials and equipment.

**SECTION 4.1.2** Contractor agrees that it will not cause, or knowingly allow any Subcontractor, Mechanic or Supplier to install any product or procedure which voids any warranty. Contractor is responsible for Subcontractors', Mechanics' and Suppliers' installation and/or non-performance on warranty work. The refusal of a Subcontractor, Mechanic or Supplier to correct

defective work for which it is responsible will not excuse Contractor from performing under the Warranty.

**SECTION 4.1.3** All warranties required in the Contract Documents shall be signed by the relevant Subcontractor, Mechanic, Supplier and manufacturer and countersigned by Contractor. Contractor is responsible for assuring that all requirements of the warranties are complied with, including the conditions of installation. All warranties shall be addressed to and delivered to Owner upon completion of the Work and before the payment of the retainage pursuant to Article 11 of the Agreement.

**SECTION 4.1.4** Contractor shall issue in writing to Owner a "General Warranty" reflecting the terms and conditions of Sections 4.3.1 and 4.3.2, upon completion of the Work and prior to the issuance of the Final Payment under Article 11 of the Agreement.

**SECTION 4.1.5** Contractor shall assign to Owner at the time of final completion of the Work any and all warranties relating to materials and labor used in the Work and shall perform the Work in such a manner so as to preserve any and all such manufacturer's warranties.

**SECTION 4.1.6** If through no fault of Contractor, it cannot warrant any product that has been specified or shown, Contractor shall notify Owner and Architect in writing as soon as discovered, giving reasons, together with the name of product and data on a substitution it can warrant.

**SECTION 4.1.7 Warranty Binders.** Contractor, as a condition precedent to Owner's obligation to issue Final Payment to Contractor, shall submit to Owner a minimum of three (3) sets of hardbound binders as well as one electronic copy (if available) of each containing the following information:

(a) All Subcontractor and manufacturer warranties and guarantees as required by the Contract Documents fully executed in the form provided in the Contract Documents or as required by the issuer of the warranty;

(b) The Contractor's General Warranty;

(c) All manufacturers' brochures, instructions and specifications received from manufacturers, Suppliers, Subcontractors, and Mechanics by Contractor or any Subcontractor, including operating and maintenance manuals. Where such manufacturers' brochures, instructions and specifications are unit specific, such documents shall be organized by unit and placed into binders;

(d) A list of all Subcontractors, Mechanics, and Suppliers who performed Work on the Project or who furnished materials for use on the Project, such list to include the name, address, telephone number and responsible person at all such entities; and

(e) All other warranties and extended warranties, including information relative to the extended warranties and procedures for processing claims under such warranties, provided by Suppliers and material manufacturers with respect to equipment and systems incorporated in to the Work.

**SECTION 4.1.8** Payment by or on behalf of Owner to Contractor or any third party shall not constitute an acceptance of the Work or any portion of the Work as having been done in accordance with the Construction Documents or be deemed to waive any of the provisions of the Construction



Documents, or release the Contractor from liability with respect to any express or implied warranty or responsibility for faulty or defective workmanship, whether any defects are latent or patent.

## **SECTION 4.2 CALL BACK RESPONSIBILITY AFTER SUBSTANTIAL COMPLETION**

**SECTION 4.2.1** During the warranty periods set forth in Sections 4.3.1 and 4.3.2, or such longer time as required by (i) any other warranties for any portion of the Work, (ii) any Applicable Laws, (including but not limited to California Civil Code section 895 et seq.) or (iii) the terms of any special guaranties required by the Contract Documents, if any Work is found to be defective, Contractor shall promptly, without cost to Owner, and in accordance with Owner's or Architect's instructions; (a) correct such defective work and (b) satisfactorily correct or remove and replace any damage to other Work. Except in an emergency, Contractor's correction of defective Work shall be commenced within five (5) Business Days after receiving written notice from Owner and completed on an *as soon as possible* basis. If, in the judgment of Owner, an emergency exists, then the corrective Work shall be commenced and completed by Contractor on an *immediate basis*. Contractor's ordering of any necessary materials to correct defective Work shall constitute "commencement" required under this Section 4.2.1.

**SECTION 4.2.2 Cooperation Regarding Requirements of Civil Code Sections 895 et seq.** Contractor and Owner each acknowledge their respective responsibilities to comply with all obligations owed as a "Builder" or "contractor" to the future Homeowner's Association and to future homeowners under California Civil Code section 895 et seq. Each Party further agrees that to the extent its own errors or omissions cause a violation of this statutory duty, such violation is also a breach of this Contract. Contractor shall ensure compliance with California Civil Code section 895 obligations owed by its Subcontractors and Mechanics and shall include provisions in their subcontracts requiring that Subcontractors and Mechanics comply with the building standards set forth in California Civil Code Section 895 et seq.

## **SECTION 4.3 EXPRESS WARRANTY**

**SECTION 4.3.1 Warranty Period for Common Area.** The Project must function as an integrated whole and therefore Contractor provides, in addition to the other warranties in Article 4, an express one (1) year warranty for all Work to the Common Area of the Project. Such warranty period will commence upon Final Completion, acceptance or placement of the entire Project into service for its intended use, whichever is later ("**Common Area Warranty Period**"). This one (1) year warranty shall not limit the terms of any special warranties given with regard to any portion of the Work and relates only to the specific warranty of Contractor, Subcontractors, Mechanics and Suppliers to correct the Work and has no relationship to the time within which the obligation to comply with the Contract Documents may be sought to be enforced, nor the time within which proceedings may be commenced to establish Contractor's, Subcontractor's, Mechanics' or Supplier's liability with respect to its obligations. **Sixty (60) days** prior to the expiration of Common Area Warranty Period, Contractor and Owner shall schedule a Project warranty walk-through to review and visually inspect the common areas of the Project and prepare for execution by the Parties a list of defects and deficiencies in the Work which must be corrected before expiration of the Common Area Warranty Period.

**SECTION 4.3.2 Warranty Period for Residential Units and Commercial Space.** Contractor agrees to provide, in addition to the other warranties in Article 4, an express one (1) year warranty for all residential units and commercial space (if any commercial space is a part of the Project). Contractor acknowledges that such units may not be sold immediately upon Final

Completion of the Project. Therefore, the one-year warranty period for each residential unit and commercial space (if any commercial space is a part of the Project) shall commence upon the earlier of the (1) close of escrow of the residential or commercial space (if applicable) or (2) rental of the residential or commercial space (if applicable), whichever occurs first. In no event will this Warranty Period be longer than twenty-four (24) months from Substantial Completion of the Project ("Residential Warranty Period").

**SECTION 4.3.3** During the Common Area Warranty Period and the Residential Warranty Period, Owner shall assign one or more customer care representatives with responsibility to act as the initial point of contact for all unit Owners for any Warranty Issues (defined below), at no cost to Contractor. Contractor shall assign one person who is familiar with the Project with the responsibility to act as the initial point of contact any Warranty Issues at no cost to Owner. During the Warranty Periods, if Contractor receives a notice from Owner of an alleged defect in construction, damage or loss resulting from any alleged deficiency in the Work, whether initiated by Owner or any unit Owner (collectively referred to as a "Warranty Issue"), Contractor shall determine the party or parties responsible for the Warranty Issue and immediately request all of the potentially responsible Subcontractors to remedy the Warranty Issue. If the responsible Subcontractors do not respond with an agreement to remedy the Warranty Issue within two (2) Business Days after the request, Contractor and Owner jointly shall decide what actions to take to resolve the Warranty Issue.

**SECTION 4.3.4** Nothing set forth in Section 4.3 shall create any claim or other direct rights against Contractor by any unit Owner or any other third party, nor constitute any such party as a third-party beneficiary.

## **SECTION 4.4 NO LIMITATIONS FOR REMEDIES**

The warranty provisions of this Article 4 do not limit or affect, any remedies that are provided by law, or provided by Contract, with respect to express or implied warranties, or negligent or willful acts or omissions of Contractor, Subcontractors or Mechanics. Nothing herein shall in any way limit the right of Owner to assert claims for any amount of damages resulting from particular defects in the Work or Contractor's obligation to comply with the Contract Documents for the period of limitations prescribed by law.

## **ARTICLE 5 INDEMNIFICATION**

### **SECTION 5.1 INDEMNITY**

In addition to the warranties and indemnities provided in the Contract and other Contract Documents, Contractor agrees to the following written obligations (collectively, the "Indemnification Obligations") set forth below.

### **SECTION 5.2 DEFINITIONS**

(a) "Indemnified Party" or "Indemnified Parties" means individually or collectively (i) Owner; all subsidiary or Affiliated companies of Owner; The Shipyard Communities, LLC; HPSCP Opportunities, LP; HPS Development Co., LP; CP Development Co., LP; CP/HPS Development Co. GP, LLC; HW SF LLP; Scala SF Investor, LLC; Lennar BVHP, LLC; LHCHPS I, LLC; Lennar Corporation; and all of such parties' successors and assigns, representatives, partners, stockholders, designees, officers, directors, agents, attorneys and employees and their respective heirs, executors,

administrators; (ii) Owner's Lender(s); and (iii) the Agency Parties (collectively, the "Indemnified Parties").

(b) "Liability" or "Liabilities" means any and all damages, costs, expenses, losses, liabilities, claims, suits, demands, debts, investigative fees, causes of action, fees, fines, judgments, penalties, including, without limitation, reasonable attorney's fees, experts' fees, and other costs of legal representation incurred in defending against any claim(s) or in enforcing this indemnity and defense obligation whether incurred, made by, or assessed against any Indemnified Party or any third person.

#### **SECTION 5.3 INDEMNITY FOR RESIDENTIAL CONSTRUCTION DEFECT CLAIMS**

This Indemnification Obligation, pursuant to this Section 5.3, applies to any Liability to any of the Indemnified Parties for Residential Construction Defect claims and damage arising out of California Civil Code section 895 et. seq. only.

**SECTION 5.3.1** To the fullest extent permitted by law and to the extent Liability is not covered by the OCIP insurance policy obtained pursuant to Article 11 (except for payment of any deductible or self-insurance obligation as provided in Exhibits S through S-3, Contractor shall defend (with counsel approved by Owner), indemnify and hold harmless the Indemnified Parties from and against all Liability relating to or arising out of the performance of Work by Contractor, Subcontractors, Mechanics, Suppliers and anyone directly or indirectly employed by them or anyone for whose acts they may be liable, provided that such Liability relates to or arises out of claims for construction defects to residential property, as set forth in California Civil Code section 895, et seq. Nothing in this Section shall be construed to provide indemnification to any Indemnified Party for claims that were caused by the Indemnified Party's negligent acts or omissions, fault or misconduct.

#### **SECTION 5.4 INDEMNITY FOR ALL OTHER CLAIMS**

This Indemnification Obligation, pursuant to this Section 5.4, applies to Liabilities to all Indemnified Parties except for Residential Construction Defect claims and damage arising out of California Civil Code section 895 et. seq.

**SECTION 5.4.1** To the fullest extent permitted by law and to the extent the Liabilities are not covered by any of the OCIP insurance obtained pursuant to Article 11, (except for payment of any deductible or self-insurance retention as provided in Exhibits S through S-3), Contractor shall defend (with counsel approved by Owner) indemnify, and hold harmless, at Contractor's sole expense, Indemnified Parties from any and all Liability relating to or arising out of the performance of Work by Contractor, Subcontractors, Mechanics, Suppliers or anyone directly or indirectly employed by them or anyone for whose acts they may be liable. This Indemnification Obligation includes, without limitation, the following:

- (1) personal injury or death (including but not limited to claims made by any of Contractor's employees) on the Project Site;
- (2) representations and warranties related to the construction and/or Design-Build Work of any homes, units, condominiums, and commercial properties, if applicable, at the Project Site;
- (3) damages for claims for loss of use, occupancy, and enjoyment of the units, homes and condominiums and/or Project Site;

- (4) property damage;
- (5) warranty claims;
- (6) liens, stop notices and charges of any type, nature, kind or description which may at any time be filed or claimed against the Project Site, or any portion thereof;
- (7) any infringement of any intellectual property rights, including without limited trade secrets, patents, trademark or copyright, or violation of trade secret or other proprietary rights;
- (8) the removal, remediation, disposing of, or transport of any Hazardous Material from, to or on the Project Site while it is under the care, custody or control of Contractor, Subcontractors, Mechanics, Suppliers or anyone directly or indirectly employed by them;
- (9) any violations of OSHA, claims of unsafe workplace or any acts, fines, penalties, citations, rule, regulation, or standard with which Contractor is obligated to comply in the performance of the Work;
- (10) any violations of applicable building codes, local, state or federal laws, statutes, or regulations;
- (11) any claim(s) under workers' compensation acts, disability benefits acts, and other employee benefit acts (provided; however, the indemnity and defense obligation hereunder shall not be limited by any limitation on the amount or type of damages compensation or benefits payable under such acts);
- (12) any claim(s) for delay or disruption;
- (13) Contractor's failure to fulfill its obligations under the Contract Documents, including but not limited to, strict compliance with the PLA and VDDA.
- (14) All claims for which Contractor is required to indemnify Indemnified Parties as stated elsewhere in the Contract Documents.

**SECTION 5.4.2** The Indemnification Obligations set forth in Section 5.4.1 include an obligation to indemnify the Indemnified Parties for Indemnified Parties' own acts, errors, omissions, and passive negligence except where the Liability is caused by the sole negligence, active negligence or willful misconduct of the Indemnified Party.

## **SECTION 5.5 DUTY TO DEFEND**

**SECTION 5.5.1** Contractor's duty to defend the Indemnified Parties is separate from and independent of Contractor's duty to indemnify the Indemnified Parties, and begins immediately upon tender of a claim to Contractor that allegedly arises out of or is related to Contractor's Work, or is potentially covered by the Indemnity Obligations. If any Indemnified Party has incurred any legal fees or other costs in defending such claims, then Contractor agrees immediately to reimburse Indemnified Party for all such legal fees and defense costs. Payment to Contractor shall not be a condition precedent to enforce Indemnified Parties' rights to indemnification. The obligations shall survive expiration or termination of the Contract. Nothing in this Article 5 shall be construed to abrogate such immediate duty to defend the Indemnified Parties.

## **SECTION 5.6 PURSUING INDEMNITY OBLIGATIONS.**

**SECTION 5.6.1** Should any Indemnified Party be required to bring any suit, action, or cross-complaint to compel performance of, or recover for breach of, any of the Indemnification Obligations under the Agreement, Contractor shall pay to the Indemnified Party the Indemnified Party's reasonable attorneys' fees, experts' fees and costs incurred by Indemnified Party therein, in addition to its costs of suit and the amount of any judgment or settlement obtained by the Indemnified Party as a result of such suit, action or cross-complaint.

## **SECTION 5.7 SUBCONTRACTS**

**SECTION 5.7.1** Contractor shall include provisions in all of its subcontracts that require each Subcontractor to indemnify the Indemnified Parties to the same extent that Contractor is required to indemnify the Indemnified Parties as set forth in this Article 5.

## **ARTICLE 6 ARCHITECT**

### **SECTION 6.1 GENERAL**

**SECTION 6.1.1** Owner shall retain an architect lawfully licensed to practice architecture or an entity lawfully practicing architecture in the jurisdiction where the Project is located. That person or entity is identified as Architect in the Agreement and is referred to throughout the Contract Documents as if singular in number.

**SECTION 6.1.2** Duties, responsibilities and limitations of authority of Architect as set forth in the Contract Documents shall not be restricted, modified or extended without written consent of Owner, Contractor and Architect. Consent shall not be unreasonably withheld.

**SECTION 6.1.3** If the employment of Architect is terminated, Owner shall employ a successor architect as to whom Contractor has no reasonable objection and whose status under the Contract Documents shall be that of Architect.

### **SECTION 6.2 ADMINISTRATION OF THE CONTRACT**

**SECTION 6.2.1** Architect will provide administration of the Contract as described in the Contract Documents and Architect will have authority to act on behalf of the Owner only to the extent provided in the Contract Documents.

**SECTION 6.2.2** Architect will visit the site at intervals appropriate to the stage of the construction, or as otherwise agreed with Owner, to become generally familiar with the progress and quality of the portion of the Work completed, and to determine in general if the Work observed is being performed in a manner indicating that the Work, when fully completed, will be in accordance with the Contract Documents. However, Architect will not be required to make exhaustive or continuous on-site inspections to check the quality or quantity of the Work. Architect will not have control over, charge of, or responsibility for, the construction means, methods, techniques, sequences or procedures, or for the safety precautions and programs in connection with the Work, since these are solely the Contractor's rights and responsibilities under the Contract Documents, except as provided in Section 3.4.3.

**SECTION 6.2.3** On the basis of the site visits, Architect will keep Owner reasonably informed about the progress and quality of the portion of the Work completed, and report to Owner (1) known deviations from the Contract Documents and from the most recent construction schedule submitted by Contractor, and (2) defects and deficiencies observed in the Work. Architect will not be responsible for Contractor's failure to perform the Work in accordance with the requirements of the Contract Documents. Architect will not have control over or charge of and will not be responsible for acts or omissions of Contractor, Subcontractors, or their agents or employees, or any other persons or entities performing portions of the Work.

**SECTION 6.2.4 Communications Facilitating Contract Administration.** Except as otherwise provided in the Contract Documents, Owner and Contractor may either communicate with each other directly or through Architect or Owner's Representative about matters arising out of or relating to the Contract. Owner or Contractor at the request of Owner, will inform Architect of the contents of communications between Owner and Contractor which relate to the Work, in a timely manner. Communications by and with Architect's consultants shall be through Architect. Communications by and with Subcontractors, Mechanics and Suppliers shall be through Contractor. Communications by and with separate contractors shall be through Owner.

**SECTION 6.2.5** Architect will review and certify the amounts due Contractor and will issue Certificates for Payment in such amounts, as requested by Owner.

**SECTION 6.2.6** Architect will review and approve, or take other appropriate action upon, Contractor's Submittals such as Shop Drawings, Product Data, Samples and Mock-ups, but only for the limited purpose of checking for conformance with information given and the design intent expressed in the Contract Documents. Architect's action will be taken in accordance with the Submittal Schedule approved by Architect or within any time limits agreed upon the Contract Documents while allowing sufficient time in the Architect's professional judgment to permit adequate review. Review of such Submittals is not conducted for the purpose of determining the accuracy and completeness of other details such as dimensions and quantities, or for substantiating instructions for installation or performance of equipment or systems, all of which remain the responsibility of Contractor as required by the Contract Documents. Architect's review of Contractor's Submittals shall not relieve Contractor of the obligations under Sections 3.4 and 3.10. Architect's review shall not constitute approval of safety precautions or, unless otherwise specifically stated by Architect, of any construction means, methods, techniques, sequences or procedures. Architect's approval of a specific item shall not indicate approval of an assembly of which the item is a component.

**SECTION 6.2.7** Architect will prepare Construction Change Directive ("CCD"), as requested by Owner. Architect may authorize minor changes in the Work as provided in Section 8.6. Architect will investigate and make determinations and recommendations regarding concealed and unknown conditions as provided in Section 8.3.4.

**SECTION 6.2.8** Architect will conduct inspections to determine the date or dates of Substantial Completion and the date of Final Completion, issue Certificates of Substantial Completion and issue a final Certificate for Payment pursuant to Article 11 of the Agreement.

**SECTION 6.2.9** Architect will interpret and decide matters concerning performance under and requirements of, the Contract Documents on written request of either Owner or Contractor. Architect's

response to such requests will be made in writing within any time limits agreed upon in the Contract Documents or otherwise with reasonable promptness.

**SECTION 6.2.10** Interpretations and decisions of Architect will be consistent with the intent of and reasonably inferable from the Contract Documents and will be in writing or in the form of drawings. When making such interpretations and decisions, Architect will endeavor to secure faithful performance by both Owner and Contractor, will not show partiality to either and will not be liable for results of interpretations or decisions rendered in good faith.

**SECTION 6.2.11** Architect will review and respond to RFIs about the Contract Documents. Architect's response to such requests will be made in writing within the time limits set forth in the Section 3.3, or if not specified in Section 3.3, with reasonable promptness. If appropriate, Architect will prepare and issue supplemental Drawings and Specifications in response to the RFIs.

## **ARTICLE 7 CONSTRUCTION BY OWNER, BY SEPARATE CONTRACTORS AND WORK PERFORMED BY CONTRACTOR**

### **SECTION 7.1 OWNER'S RIGHT TO PERFORM CONSTRUCTION AND TO AWARD SEPARATE CONTRACTS**

**SECTION 7.1.1** Owner reserves the right to perform construction or operations related to the Project with Owner's own forces, and to award separate contracts in connection with other portions of the Project. If Contractor claims that delay or additional cost is involved because of such action by Owner, Contractor shall make such Claim as provided in Articles 8 and 9.

### **SECTION 7.2 MUTUAL RESPONSIBILITY**

**SECTION 7.2.1** Contractor shall afford Owner and separate contractor's reasonable opportunity for introduction and storage of their materials and equipment and performance of their activities, and shall connect and coordinate Contractor's construction and operations with theirs as required by the Contract Documents.

**SECTION 7.2.2** If part of Contractor's Work depends for proper execution or results upon construction or operations by Owner or a separate contractor, Contractor shall, prior to proceeding with that portion of the Work, promptly report to Owner and Architect discrepancies or defects in such other construction of which Contractor is aware that would render it unsuitable for such proper execution and results in accordance with requirements set forth in Sections 3.3.2, 3.3.3 and 3.3.4. Failure of Contractor so to report shall constitute an acknowledgment that Owner's or separate contractor's completed or partially completed construction is fit and proper to receive Contractor's Work.

**SECTION 7.2.3** Contractor shall reimburse Owner for costs Owner incurs that are payable to a separate contractor because of Contractor's delays, improperly timed activities or defective construction. Owner shall be responsible to Contractor for costs Contractor incurs caused by a separate contractor's delays, damage to the Work or defective construction.

**SECTION 7.2.4** Contractor shall promptly remedy damage Contractor wrongfully causes to completed or partially completed construction or to property of Owner or its Affiliates.

**SECTION 7.2.5** Owner and each separate contractor shall have the same responsibilities for cutting and patching as are described for Contractor in Section 3.12.

## **ARTICLE 8 CHANGES IN THE WORK**

### **SECTION 8.1 GENERAL**

**SECTION 8.1.1** Changes in the Work may be accomplished after execution of the Contract, and without invalidating the Contract, by Change Order, CCD or order for a minor change in the Work, subject to the limitations stated in this Article 8 and elsewhere in the Contract Documents.

**SECTION 8.1.2** A Change Order shall be based upon agreement among Owner and Contractor; a CCD requires agreement by Owner and Architect and may or may not be agreed to by Contractor; an order for a minor change in the Work may be issued by Owner or Architect alone.

### **SECTION 8.2 CONSTRUCTION CHANGE DIRECTIVE**

**SECTION 8.2.1** A CCD is a written order prepared by Architect or Owner and signed by Owner and Architect, directing a change in the Work prior to agreement on adjustment, if any, in the Contract Sum or Contract Time, or both. Owner may by CCD, without invalidating the Contract, order changes in the Work within the general scope of the Contract consisting of additions, deletions or other revisions, the Contract Sum and Contract Time being adjusted accordingly.

**SECTION 8.2.2** A CCD shall be used in the absence of total agreement on the terms of a Change Order.

**SECTION 8.2.3** Unless the CCD provides otherwise, Contractor shall promptly perform the changes to the Work set forth in the CCD.

**SECTION 8.2.4** Contractor shall immediately inform Owner and Architect of any potential or actual conflicts in the Contract Documents with respect to the CCD.

**SECTION 8.2.5** If the CCD contains a requirement for Contractor to submit a proposal for increased in the Contract Sum or an extension of Contract Time or Contractor believes that the CCD will result in additional costs or an extension of the Contract Time, Contractor shall endeavor to deliver such proposal ("Change Order Request") to Owner within ten (10) Business Days but no longer than fifteen (15) Business Days after Owner's delivery of the CCD. The proposal shall state the date by which Owner must accept the proposal in order for any cost and/or time estimates to remain valid together with any other information requested by Owner. If Owner accepts the proposal or the Parties agree to an adjustment, if any in the Contract Sum or Contract Time, or both, a Change Order will be prepared and signed by Owner, Architect and Contractor.

**SECTION 8.2.6** If the CCD provides for an adjustment of the Contract Sum or Contract Time, or both, the adjustment shall be based on one of the following methods:



- (a) Mutual acceptance of a lump sum properly itemized and supported by sufficient data to permit evaluation or Contract Time extension or reduction;
- (b) Unit prices stated in the Contract Documents, if any, or subsequently agreed upon; or
- (c) By actual directly incurred costs plus an agreed-upon "mark-up" for Contractor's overhead. With respect to costs for Subcontractors, the cost shall include the lesser of (a) ten percent (10%) markup for overhead and five percent (5%) markup for profit, or (b) the rates for overhead and profit provided in Subcontractor's agreement with Contractor.

**SECTION 8.2.7** A CCD signed by Contractor indicates its agreement therewith, including any adjustment in Contract Sum and/or Contract Time or the method for determining the adjustments. Such agreement shall be effective immediately and shall be recorded as a Change Order.

**SECTION 8.2.8** If Owner and Contractor cannot reach mutual agreement as to the terms of the CCD, the Parties will attempt to resolve the dispute informally within thirty (30) days from the date that the CCD work was performed. If the dispute continues, the Parties will follow the dispute resolution procedures in Article 16, unless otherwise agreed to by the Parties. Owner may request Contractor to submit documents supporting Contractor's claims for Contract Sum and/or Contract Time adjustments. If agreement is reached, such agreement shall be effective immediately and the CCD shall be recorded as a Change Order.

## **SECTION 8.3 CHANGE ORDERS**

**SECTION 8.3.1** A Change Order is a written instrument prepared by Owner and signed by Owner and Contractor stating their agreement upon all of the following:

- (a) the change in the Work;
- (b) the amount of the adjustment in the Contract Sum, if any; and
- (c) the extent of the adjustment in the Contract Time, if any.

**SECTION 8.3.2** Changes in the Work shall be performed under applicable provisions of the Contract Documents, and Contractor shall proceed promptly, unless otherwise provided in the Change Order.

**SECTION 8.3.3** Contractor shall not be entitled to the payment of any increases in the Contract Sum or extensions to the Contract Time for any reason, including but not limited to Owner's failure or refusal to issue a Change Order, unless Contractor gives Owner written notice of a potential claim within fifteen (15) Business Days from the date of the CCD, a response to an RFI or performance of any Work for which Contractor intends to make a claim. All claims that are not presented to Owner within fifteen (15) Business Days will be deemed waived by Contractor. Except as expressly permitted in these General Conditions, a change in the Contract Sum or the Contract Time shall be accomplished only by Change Order. Accordingly, no course of conduct or dealings between the Parties, nor express or implied acceptance of alterations or additions to the Work, and no claim that Owner has been unjustly enriched by any alteration of or addition to the Work, whether or not there is in fact any unjust enrichment to the Work, shall be the basis of any claim to an increase in the Contract Sum or a change in the Contract Time except as provided for in the Contract Documents.

**SECTION 8.3.4 Change Orders for Unknown Concealed Conditions.** If Contractor encounters conditions at the Project Site that are (1) subsurface or unknown or otherwise concealed physical conditions which differ materially from those indicated in the Contract Documents, or (2) unknown physical conditions of an unusual nature, which differ materially from those ordinarily found to exist and generally recognized as inherent in construction activities, then Contractor shall give notice to Owner before such conditions are further disturbed within three (3) Business Days, after such conditions are first observed by Contractor. If requested by Owner, the appropriate engineering or design consultant will promptly investigate such conditions. The consultant will determine if the conditions are or are not materially different from those indicated in the Contract Documents and will notify Owner and Contractor, in writing, of the basis for its determination. If consultant determines that the conditions differ from the expected conditions at the Project Site and cause an increase or decrease of the Cost of the Work, or Contract Time, then Owner's consultant will recommend an adjustment in the Contract Sum and/or Contract Time. If such consultant determines that the conditions at the Project Site are not materially different from those indicated in the Contract Documents and then consultant will not recommend any change in the Contract Sum and/or Contract Time. **Claims by either Party in opposition to Owner's consultant's determination must be made to Owner or Contractor, in writing, within ten (10) Business Days after such consultant has given notice of the decision to Owner and Contractor or they are waived, and the decision of the consultant will be final.**

**SECTION 8.3.5 Change Order Adjustments.** If Owner and Contractor cannot reach mutual agreement as to the terms and conditions of a Change Order, Owner can direct that the Change Order Work be performed, and Contractor shall proceed to perform the Change Order Work pending resolution of the Change Order terms and conditions. Owner may request Contractor to submit documents supporting Contractor's claims for Contract Sum and/or Contract Time adjustments. The Parties will attempt to resolve the any dispute pertaining to the Change Order, informally within thirty (30) days from the date that the Change Order work was performed. If the dispute continues the Parties will follow the dispute resolution procedures in Article 16, unless otherwise agreed to by the Parties. Alternatively, prior to directing Contractor to perform the work, Owner may request Contractor to submit bid prices and time adjustments for the modifications on the Work consistent with the Cost of the Work covered by the Agreement to the extent possible.

#### **SECTION 8.4 ADJUSTMENTS TO CONTRACT TIME AND CONTRACT SUM FOR CHANGE ORDERS**

**SECTION 8.4.1** If the Contract Time is increased or reduced by Change Order or CCD, Contractor's general conditions expenses shall be increased or reduced in an amount computed in accordance with the Contract Documents or as otherwise agreed by the Parties. If the Contract Sum is decreased by a Change Order or CCD, or combination of Change Orders and/or CCDs that are related to similar changes in the Work is an amount in excess of ten percent (10%) of the original GMP, Contractor's Fee will be decreased by the reduction in the Cost of Work multiplied by four percent (4%), pursuant to Section 5.4 of the Agreement. Contractor shall not be entitled to any compensation for loss of anticipated profits resulting from reduction in the Scope of Work.

#### **SECTION 8.5 GENERAL**

**SECTION 8.5.1** Upon receipt of a duly authorized Change Order and CCD, Contractor shall not thereafter perform any work or order materials that would be inconsistent with the modification required by the Change Order or CCD. Contractor shall observe and perform the duties of Contractor

under the Contract Documents until a Change Order or CCD has been signed by Owner and Contractor. Except in the case of an emergency, Contractor shall not make any changes, either in additions or reductions in the Scope of the Work without a CCD or Change Order and Owner will not pay any charges made by Contractor for such unauthorized work.

**SECTION 8.5.2** If Contractor initiates or makes a substitution, deviation, modification or any change(s) in the Work (without prior written approval from Owner) which affects the Work, the Contract Time, or causes added expense to Owner, or others performing Work on the Project, Contractor shall be liable to Owner for all additional costs created by, or arising out of, such unauthorized change(s) in the Work. Owner may, at its option, off-set such costs against monies due Contractor until Owner has been credited in full for all additional costs so incurred.

**SECTION 8.5.3** Contractor shall provide Owner complete backup data such as labor, material, equipment, labor burden and such other information and in the case of approved Change Orders, payroll records, paid receipts and canceled checks (when requested by Owner) for review and approval for approved Change Orders Work that have been completed.

**SECTION 8.5.4** No change, alteration, modification or deviation from the Contract Documents (whether made in the manner herein provided or not) shall release or exonerate, in whole or in part, any surety on any bond given in connection with the Project. Owner shall not be under any obligation to notify Contractor's surety or sureties of any such Change(s) in the Work.

**SECTION 8.5.5** The mutual execution of any Change Order by Owner and Contractor shall constitute a final settlement of all matters relating to the change in the Work that is the subject of the Change Order, including, but not limited to, all direct and indirect costs associated with such Change Order and any and all adjustments to the Contract Sum and the Contract Time.

## **SECTION 8.6 MINOR CHANGES IN THE WORK**

**SECTION 8.6.1** Architect, with prior approval of Owner, has authority to order minor changes in the Work not involving adjustment in the Contract Sum or extension of the Contract Time and which are not inconsistent with the intent of the Contract Documents. Such changes shall be effected by written order signed by Architect and shall be binding on Owner and Contractor.

## **ARTICLE 9 TIME**

### **SECTION 9.1 PROGRESS AND COMPLETION**

**SECTION 9.1.1** Time limits stated in the Contract Documents are of the essence of the Contract. By executing the Agreement, Contractor confirms that the Contract Time is a reasonable period for performing the Work.

**SECTION 9.1.2** Neither Contractor nor any of the Subcontractors shall commence any Work until such time as Owner has received, reviewed and approved evidence satisfactory to Owner that all insurance as required in Article 11 has been obtained by such parties and that such insurance is in conformance with the Contract and is in form and substance satisfactory to Owner. The obligation to obtain and maintain the insurance required hereunder shall be in addition to and in no way limiting Contractor's other obligations under the Contract. Contractor shall and shall require Subcontractors to

maintain the policies of insurance required in Article 11 throughout the term of the Contract (or such longer term as may be required under Article 11). **If Contractor and/or Subcontractors' required insurance lapses following the commencement of the Work, such any Contractor and/or Subcontractors and any other persons under its direct or indirect control are prohibited from entering the Project Site and from performing any Work.** Failure to obtain and maintain the requisite insurance and deliver satisfactory evidence of insurance to Owner of the valid insurance policies and certificates in order to enable Contractor and/or Subcontractors to commence the Work on the Commencement Date or complete the Work pursuant to the Construction Schedule shall constitute Contractor's default hereunder.

## **SECTION 9.2 DELAYS AND EXTENSIONS OF TIME**

**SECTION 9.2.1 Permissible Delay.** If Contractor is delayed in the performance of the Work by (a) damage or interference caused by fire, or other casualty, or work stoppages due to Governing Authorities, not caused in whole or in part, by Contractor, Subcontractors, Mechanics or Suppliers, (b) acts of God; (c) labor disputes not unique to the Project, or (d) the activities of any individual or group that, by their actions whether privately or in a public forum, prevent reasonable access to the Site collectively, ("**Permissible Delay**"), then Contractor may make a claim for an extension of the Contract Time pursuant to Article 9, by submitting the notice and justification required therein. Notwithstanding anything to the contrary herein, Contractor shall only be entitled to an extension of the Contract Time if:

- (i) Contractor notified Owner in writing of the Permissible Delay within ten (10) Business Days of the occurrence of such delay. Contractor waives any claim for Permissible Delay if Contractor fails to provide Owner with such requisite written notice;
- (ii) the delay causes a delay in one or more Work activities which cannot be delayed without delaying the completion of the Work for the entire Project beyond the Substantial Completion Date ("**Critical Path Delay**"); and such Permissible Delay actually causes the Substantial Completion Date to be after the Contract Time, as adjusted; and
- (iii) Contractor has properly provided and maintained the Construction Schedule as required by the Contract Documents.

**SECTION 9.2.2 Weather Delay.** If Contractor is delayed in the performance of the Work by "**Weather Delay**" defined as climatic conditions in the immediate location of the Project Site which are extraordinary, including rainfall which exceeds .10 of an inch in a day, Contractor may make a claim for an extension of the Contract Time. Contractor agrees that it has accounted for 18 Business Days of Weather Delay in its Construction Schedule based upon an approximate Date of Commencement of June 10, 2013. Contractor shall only be entitled to an extension of the Contract Time only if:

- (i) Contractor notified Owner in writing of the Weather Delay within five (5) Business Days of the occurrence of such delay. Contractor waives any claim for Weather Delay if Contractor fails to provide Owner with such requisite written notice;
- (ii) the Weather Delay caused a Critical Path Delay as defined in Section 9.2.1 and such Weather Delay actually causes the Substantial Completion Date to be after the Contract Time as adjusted;

- (iii) Weather Delay occurred when the units were open to the elements; and
- (iv) Contractor has properly maintained the Construction Schedule as required by the Contractor Documents.

**SECTION 9.2.2.1** During the duration of the Project, Owner and Contractor will keep records of the number of agreed-upon Weather Delays in the form attached as Exhibit P, which will be signed by both Parties and amended as subsequent Weather Delays occur. Should the Weather Delays exceed the number of days accounted for in the Construction Schedule as stated in Section 9.2.2, the Contract Time will be extended by that amount by extending the number of Business Days, provided that all of the criteria set forth in Section 9.2.2 (i) through (iv) are met.

**SECTION 9.2.3 Owner Delay.** If Contractor is delayed at any time in the commencement or progress of the Work by any (i) Owner, Owner's consultants, Architect, or separate contractor caused delay in the commencement, prosecution, or completion of the Work, or (ii) hindrance of obstruction in the performance of the Work, caused by acts of Owner, Owner's consultants, Architect, or separate contractor, not permitted by the Contract Documents, constituting interference with Contractor's performance of the Work (collectively referred to as "Owner Delays"), Contractor shall only be entitled to an extension of the Contract Time if:

- (i) Contractor notified in writing of the Owner Delay within ten (10) Business Days of the occurrence of such delay and such acts continue after Contractor furnishes Owner with written notice that Owner, its consultants, Architect or separate contractor are interfering with Contractor's execution of the Work. Contractor waives any claim for Owner Delay if Contractor fails to provide Owner with such requisite written notice;
- (ii) the Owner Delays caused a Critical Path Delay as defined in Section 9.2.1, and such Owner Delay actually caused the Substantial Completion Date to be after the Contract Time as adjusted; and
- (iii) Contractor has properly maintained the Construction schedule as required by the Contractor Documents.

**SECTION 9.2.4** Extensions of the Contract Time will not be granted for Owner's or Architect's failure to act upon any Submittals, render any interpretations or furnish additional drawings, or any other failure to respond to a Contractor request or RFI, unless:

- (i) Owner, its consultants or Architect fails to so act within the time set forth in the Specifications, or this Contract, with the Specifications taking precedence, and if no time is specified in the Specifications or the Contract, within ten (10) Business Days after receipt of a Submittal or written request;
- (ii) Contractor furnishes Owner with written notice of such delay within fifteen (15) Business Days of the Submittal, or request. Contractor waives any claim for delay under Section 9.2.4 if Contractor fails to provide Owner with such requisite written notice;
- (iii) the Owner Delays caused a Critical Path Delay as defined in Section 9.2.1, and such Owner Delay actually caused the Substantial Completion Date to be after the Contract Time as adjusted; and

(iv) Contractor has properly maintained the Construction Schedule as required by the Contractor Documents.

However, no extensions of the Contract Time will be granted where such Submittal was not submitted to Owner, its consultants or Architect within the time set forth in the Submittal Schedule, or if not on the Submittal Schedule, within a reasonable time.

**SECTION 9.3** Contractor's failure to notify Owner of any of the delays in strict conformance with the requirements in Sections 9.2.1 through 9.2.4 shall be deemed a waiver of any such claims for Contract Time adjustments and any related claims for adjustments to the Contract Sum.

**SECTION 9.4** All adjustments to the Contract Time shall be made by adding Business Days, as opposed to calendar days.

**SECTION 9.5** Notwithstanding anything to the contrary in the Contract Documents, an extension in the Contract Time, to the extent permitted under this Article 9 and an increase in Contractor's general conditions costs at the Daily Field Overhead Rate computed in accordance with Section 9.5.1 of these General Conditions, shall be the **sole** remedy of Contractor for all delays regardless of cause.

**SECTION 9.5.1** Provided that Contractor gave Owner timely notice of Delay pursuant to Section 9.2, Contractor shall be permitted an adjustment to the Contract Price equal to (i) the total amount of the time-sensitive "**Contractor's Daily Field Overhead**", which the Parties agree is \$1,595.00 multiplied by the number of Business Days by which the Contract Time is extended as a result of any compensable delay.

**SECTION 9.6** If Contractor submits a Monthly Progress Report or any other report indicating Contractor's inability to achieve completion of the Work prior to any completion date required by the Contract Documents such reports shall not modify any schedule, the Contract Sum or GMP or provide notice of a claim as required under Section 8.3.3 or Sections 9.2.1 through 9.2.4, notwithstanding any statements therein; only properly authorized Change Orders in accordance with Article 8 shall have such effect.

**SECTION 9.7** Except when a delay pursuant to Sections 9.2.1 through 9.2.4 is involved, Contractor shall, at its own expense without an increase in the Cost of the Work, perform Extraordinary Measures to ensure the diligent, continuous and uninterrupted prosecution of the Work for a duration set by Owner, or until the Work complies with Construction Schedule.

**SECTION 9.8** Regardless of the cause of the delay, Contractor shall propose an affirmative plan to correct the potential or actual delay in the next Monthly Report, or sooner, as requested by Owner. Owner may request Contractor to perform Extraordinary Measures for a duration set by Owner, or until the Work complies with the Construction Schedule.

## **SECTION 9.9 LIQUIDATED DAMAGES FOR DELAYS**

**SECTION 9.9.1** Time is of the essence in the Contract Documents and all obligations thereunder.

**SECTION 9.9.2** The Time for Substantial Completion of the Work as adjusted by Permissible Delay, Weather Delay, Owner Delay or otherwise modified by Change Order pursuant to Article 8 of these General Conditions is referred to as "**Adjusted Contract Time**".

**SECTION 9.9.3** Contractor acknowledges and agrees that if Contractor fails to achieve Substantial Completion of the Work within the Adjusted Contract Time, Owner will sustain damages and a loss as a result of such failure. The exact amount of such damages is extremely difficult to ascertain. Therefore, Owner and Contractor agree to the terms in Sections 9.9.4 and 9.9.5.

**SECTION 9.9.4** If Contractor fails to achieve Substantial Completion of the entire Work by the date the Adjusted Contract Time plus an additional fourteen (14) calendar days' grace period, Owner shall be entitled to retain or recover from Contractor as liquidated damages for the delay in achieving Substantial Completion, but not as a penalty. The amount of the liquidated damages will be calculated at a rate of two thousand five hundred dollars (\$2,500) per calendar day, commencing upon the 15th (fifteenth) day following the expiration of the Adjusted Contract Time and continuing for each day until the actual date of Substantial Completion of the Work.

**SECTION 9.9.5** The imposition of liquidated damages as provided in Section 9.9 shall be Owner's exclusive monetary remedy for damages for delay for failure to achieve Substantial Completion of the entire Work within the Adjusted Contract Time. It being further understood that under no circumstance will Contractor be liable for indirect, direct, consequential or any other type of damages sustained or allegedly sustained by Owner due to such delay. Nothing in this Section shall be construed as limiting Owner's right to require timely completion of the Work.

  
OWNER'S INITIALS

  
CONTRACTOR'S INITIALS

**ARTICLE 10**  
**PROTECTION OF PERSONS, PROPERTY, WORK AND PROJECT SITE;**  
**HAZARDOUS MATERIAL, SITE CLEANING**

**SECTION 10.1 SAFETY PRECAUTIONS OF PERSONS AND PROPERTY**

**SECTION 10.1.1** Contractor shall be **solely responsible**, at Contractor's own expense, for ensuring that the Work is performed in a safe manner to prevent damage, injury and loss to; (i) those persons performing Work and other persons who maybe affected thereby; (ii) the Work and materials and equipment to be incorporated therein, whether in storage on or off the Project Site, under care, custody or control of Contractor, Subcontractors or Mechanics; and (iii) other property at the Site or adjacent thereto, such as trees, shrubs, lawns, walks, pavements, roadways, structures and utilities not designated for removal, relocation or replacement in the course of construction. Contractor is solely responsible for initiating, maintaining, supervising and strictly enforcing all safety precautions and programs in connection with the performance of the Work and Contractor shall strictly enforce the safety policy of Contractor and comply with all federal and state current, specific safety regulations promulgated as part of Applicable Laws, including, without limitation, the requirements of the Occupational Safety Health Act of 1970, and any analogous California laws, the Construction Safety Act of 1969 and all successors and amendments thereto, and all standards and regulations which have been, or shall be, promulgated by the parties or agencies which administer said Acts.

**SECTION 10.1.2** Contractor's designated superintendent has the duty of accident-prevention.

**SECTION 10.1.3** Contractor shall notify Owner and the OCIP administrator, within one (1) day, both verbally and in writing, of any injury to any person present on the Project Site with all provide sufficient detail to enable Owner to investigate the matter.

**SECTION 10.1.4** Contractor shall erect and maintain, as required by existing conditions and performance of the Work, reasonable safeguards for safety and protection, including posting danger signs and other warnings against hazards, promulgating safety regulations and notifying owners and users of adjacent sites and utilities. Contractor shall not permit any part of the construction or Site to be loaded or maintained so as to cause damage or create an unsafe condition.

**SECTION 10.1.5** Contractor shall and Contractor shall require that all Subcontractors execute the Occupational Safety and Health Administration ("OSHA") Addendum attached as Exhibit Q as conditions precedent to the effectiveness of the Agreement or any subcontract. Such responsibility shall include the procurement of any special permits relating to performance of the Work, including underground dig permits, erection of scaffolding permits and similar permits. Contractor shall establish, implement and maintain an effective injury prevention program to safeguard all parties on the Project Site. Contractor shall have and exercise full responsibility and liability for compliance hereunder by Contractor's own forces, Subcontractors, Mechanics, and their respective invitees with respect to the Work.

**SECTION 10.1.6** OSHA has promulgated regulations ("Regulations") which are entitled OSHA Hazard Communication Standard. Among other things, the Regulations require all contractors and subcontractors to exchange Material Safety Data Sheets ("MSDS") attached as Exhibit R and share information about precautionary measures necessary to protect all workers on a building project. Contractor agrees as follows:

(a) Contractor will fully comply with the Regulations and will cooperate with Owner and all consultants/contractors of Owner in order to assure compliance with the Regulations;

(b) Contractor hereby accepts full responsibility and liability for the training of its employees as to all precautionary measures necessary to protect such employees during both routine and emergency situations on the Project Site;

(c) Contractor will indemnify, defend and hold Indemnified Parties harmless from all claims, damages, losses and expenses which arise from the failure of Contractor to comply with the Regulations;

(d) Contractor will assist Owner in complying with the Regulations.

**SECTION 10.1.7** Failure to adhere to the safety requirements of these General Conditions shall be deemed a material default of safety rules promulgated by Owner in furtherance of Contractor's duties under OSHA. If, in Owner's sole opinion, health and safety of any person or persons is endangered or appropriate safety measures are not being implemented, Owner may (but is not required to) take such action as it deems necessary and appropriate, including without limitation, the following: (i) stop Contractor's Work or require Contractor to immediately remedy any unsafe condition caused by Contractor at its own expense; (ii) shut the Project or Project Site down in whole or in part, until any unsafe condition is remedied; (iii) remedy any unsafe condition caused by Contractor at Contractor's sole expense; (iv) terminate the Agreement and hold Contractor fully liable for any losses incurred by Owner as a result of the Contractor-caused unsafe condition and such termination; (v) recover against Contractor all fines or penalties assessed by any authority



(governmental or otherwise) and caused by or alleged to have been caused by Contractor's, Subcontractors' or Mechanic's violation of its obligations set forth in Article 10; and (v) enforce any other applicable provisions in the Agreement and General Conditions. Owner's rights pursuant to this section, do not in any manner obviate the Contractor's obligations under Article 10, or shift any responsibility for site safety from Contractor to Owner.

**SECTION 10.1.8** Contractor shall directly receive, respond to, defend and be responsible for any citation, assessment, fine or penalty by reason of Contractor's failure, or failure of Contractor's employees, representatives, invitees, Subcontractors, or Mechanics to so comply to Article 10. If Contractor fails to comply with any citation issued by the office of the Secretary of Labor, any order issued by the Occupational Safety & Health Review Commission, or any order issued by the Division of Industrial Safety of the State, or Owner, or of any body responsible for the administration and/or enforcement of any statute, regulation or ordinance relating to occupational health and safety within the period specified in any such citation or order, such failure shall be a material default under the Agreement.

**SECTION 10.1.9 Dangerous Conditions.** If Contractor suspects or becomes aware that any safety devices, operational devices or equipment being utilized in any portion of the Work or the Project (whether or not furnished under the Contract Documents), are unsafe and/or are not operating in a safe or correct manner, or suspects or becomes aware of any other unsafe condition at the Project Site, Contractor shall immediately take all reasonable steps to mitigate the impact of such condition, including if necessary to protect persons or property, cease such Work, remove all persons employed or engaged by it or any Subcontractor to a safe location, and immediately notify Owner. Furthermore, no Work shall resume in the area so affected until all safety devices, operational devices or equipment are safe, and all unsafe conditions are appropriately abated, without regard to which party has ultimate responsibility for the dangerous condition.

## **SECTION 10.2 PROTECTION OF WORK AND PROJECT SITE**

**SECTION 10.2.1 General Requirements.** Contractor shall take reasonable care to safely secure and protect the Work and all materials located at the Project Site or otherwise stored from damage or harm, from all sources, and Contractor shall assume full responsibility for the condition thereof until acceptance by Owner. Contractor shall be liable for any loss or damage to any Project Work, to any equipment and materials on or about the Project Site and workmen thereon, which Contractor, Subcontractor, Mechanics or those persons under the control of Contractor cause or which arise as a result of defective work.

**SECTION 10.2.2 Adjacent Property.** Contractor shall also take all steps necessary to protect property adjacent and in the vicinity of the Project Site, including but not limited to surface improvements and underground improvements. Within five (5) Business Days of the Effective Date of the Agreement, Contractor and Owner will walk the Project Site, adjacent properties and vicinity of the Project Site to determine and photograph the existing conditions of those areas. Contractor is solely responsible for any damage caused to any and all improvements at the Project Site, adjacent properties and vicinity of the Project Site by it, Subcontractors, Mechanics, Suppliers or anyone or entity under its control. In the event that any of the improvements are damaged, Owner, at its sole and absolute discretion, can (i) withhold the costs of repairing such improvements or property from any payments owed to Contractor; and if no payments are due or the amount is insufficient to cover the costs of the repairs, Contractor must remit such costs to Owner within ten (10) Business Days of Owner's request; (ii) demand that Contractor repair the property or improvements at its sole

cost to the sole satisfaction of Owner and any applicable Governing Authority; and (iii) assert any other rights Owner has pursuant to the provisions of the Contract.

**SECTION 10.2.3** Contractor shall minimize any interference with the occupancy or beneficial use of (i) any areas and building adjacent to the Project Site and (ii) the buildings being constructed in the event of partial occupancy. Contractor shall not permit anyone to use any existing facilities at the Project Site, including, without limitation, lavatories, toilets, entrances, and parking areas, other than those designated by Owner, without prior written approval of Owner.

**SECTION 10.2.4** Contractor shall use its best efforts to comply with all reasonable rules and regulations promulgated by Owner in connection with the use and occupancy of any portion of, and the ingress to and egress from, the Project Site and the buildings being constructed that have achieved Substantial Completion. Contractor shall immediately notify Owner, in writing, if during the performance of the Work, Contractor finds compliance of any portion of such rules and regulations to be impracticable, setting forth the problems of such compliance and suggesting alternatives through which the same results intended by such portions of the rules and regulations can be achieved. Owner may adopt such Contractor suggestions, develop new alternatives, or require compliance with the existing requirements of the rules and regulations.

**SECTION 10.2.5 Daily Cleaning.** Contractor shall deposit all construction debris and any other waste generated by the Work, including, without limitation, all food refuse and other items normally disposed by laborers, in the designated trash bins on a daily basis and keep the Project Site clean and free from accumulation of waste materials or rubbish and will perform such general cleaning of the Project on an on-going and regular basis as Owner may require. Contractor will broom clean the model area, if applicable, on a daily basis. It shall be Contractor's obligation under this Section to provide a sufficient number of small trash receptacles throughout the Project, and to instruct all Subcontractors, Mechanics, and laborers working on the Project to deposit all waste materials in such small trash receptacles in a manner which prevents waste or debris from accumulating unnecessarily on the Project Site. All such small trash receptacles shall be emptied into the designated trash bins on a daily or more frequent basis to avoid overflow. At completion of the Work, Contractor (a) shall remove from and about the Project waste materials, rubbish, Contractor's tools, construction equipment, scaffolding, machinery and surplus materials (unless permitted by Owner to leave such materials at the Project Site) leaving the Project sufficiently clean so that all component structures of the Project may immediately be occupied for their intended uses without further cleaning, except as set forth in clause (b) hereof, and (b) shall employ professional cleaners to clean all of the interior portions of the building and the portions of the exterior of the Project, including, without limitation, the concrete and masonry, as Owner may in its sole discretion require. The final cleaning will take place at such time as scheduled by Contractor in consultation with Owner.

**SECTION 10.2.6** Contractor shall maintain the Project Site and the vicinity thereof (that may be impacted by its operations) in a clean, neat, safe and production-ready condition. Contractor shall remove from the Project Site all excess material daily during the performance of the Work and all equipment, unused material and temporary structures upon Substantial Completion of the Work, unless Contractor is performing work at another location at Hunters Point Shipyard, and Owner has agreed to the material and structures remaining on the Project Site. Contractor shall return each fence, barrier and obstruction that is temporarily relocated or displaced by Contractor to its original position and condition. If Contractor fails to so maintain the Project Site as required in Article 10, Owner may, upon the giving of one (1) Business Day notice to Contractor, perform all work necessary to cause the Project Site to be so

maintained and charge all costs related thereto to Contractor plus fifteen percent (15%) of the costs incurred by Owner in connection therewith.

**SECTION 10.2.7 Picketing.** If the Project Site is picketed, Contractor shall establish a reserved gate and Contractor shall use its best efforts to continue performance of the Work without interruption or delay. Contractor shall also be solely responsible for all traffic control necessary to perform the Work in a timely manner and in compliance with all Applicable Laws.

**SECTION 10.2.8 Signs.** Contractor shall not post or display any signs at or in the vicinity of the Project Site nor permit the same of any Subcontractors, Mechanics and Supplier except with the prior written approval of Owner as to the sign and its characteristics and location. Contractor shall adhere, and shall cause Subcontractors, Mechanics and Suppliers to adhere to and observe all signs posted at the Project Site.

**SECTION 10.2.9** Contractor shall be responsible for the personal property of Contractor and all of its Subcontractors, Mechanics and Suppliers including but not limited to property to be incorporated into the Work, at all times during the performance of the Work. Contractor's responsibility shall include, but not be limited to, theft, fire, vandalism, or use by unauthorized persons to the extent not covered by Owner's Builder's Risk Insurance under Article 11. Contractor's responsibility commences on the earlier of (i) the date that its security guard commences his or her work or (ii) the date that the materials for rough carpentry arrive to the Project.

**SECTION 10.2.10** Contractor shall store all materials, supplies, equipment and goods involved in the performance of the Work in appropriate containers or enclosures that are secure from access by persons not associated with the performance of the Work in locations acceptable to Owner. If any materials, equipment or goods involved in the performance of the Work are to be stored Off-Site ("**Stored Materials**"), such Stored Materials must be stored at Contractor's sole expense, unless otherwise agreed in advance by Owner, at a bonded warehouse facility located within the near vicinity of the Project or as otherwise approved in advance and in writing by Owner ("**Off-Site Warehouse**"). The cost of the Off-Site Warehouse shall be included in the Contract Sum. All Stored Materials placed in an Off-Site Warehouse shall be (i) segregated and clearly identified as being owned by Owner for incorporation into the Project and being subject to Owner's liens and security interests, and (ii) covered by insurance against loss, damage, theft or vandalism. Contractor shall not, without Owner's prior written consent, purchase or order any Stored Materials for delivery more than forty-five (45) days (or such longer period specifically approved by Owner) prior to the scheduled incorporation of such Stored Materials into the Project. Owner shall make an advance payment for Stored Materials except for the costs (as set forth below) for Stored Materials provided (a) the Stored Materials are in Owner's possession stored at the Project Site or at an Off-Site Warehouse and are, unless otherwise agreed by Owner in writing, to be incorporated into the Project within forty-five (45) days (or such longer period specifically approved by Owner) from the date of receipt by Owner. Any advance payment for Stored Materials shall not include any profit, fee or other mark-up beyond the charges made by the vendor to the first purchaser in connection with the Project. The aggregate amount of all advanced payments for Stored Materials not yet incorporated into the Project shall not exceed an amount permitted by the Lender, if applicable, at any one time unless otherwise agreed by Owner in writing; and not later than the time of the advanced payment. Owner's Lender, if applicable, shall have perfected a first priority security interest in such Stored Materials for which the advance payment is requested, and unencumbered ownership of which Stored Materials has vested in Owner subject only to the security interest in favor of Owner's Lender.

**SECTION 10.2.11** If the rental of equipment is used to perform the Work, Contractor shall be solely responsible for such rental equipment until it is returned to the source of supply. Such responsibility shall include, but not be limited to, damages to the Project, Contractor's or any other Subcontractor's separate work being done on the Project, or personal injury or property damage

arising as a result of theft, fire, vandalism, or use of such rental equipment by unauthorized persons.

**SECTION 10.2.12** Contractor hereby expressly waives and releases Owner, its Affiliates, and their agents and employees from all claims, demands, expenses, debts, damages and liabilities, including without limitation lost wages, pain and suffering, loss of consortium, permanent or temporary disability, medical and hospital expenses, attorneys' fees and cost of repair and replacements of Contractor's, Subcontractor's and Mechanic's property, which in any way arise from or is related to (a) the physical and/or security or maintenance of the Project Site, and the vicinity thereof; (b) vandalism, theft or any other willful or negligent act by any person at the Project Site, or in the vicinity thereof, including without limitation, the operation of a motor vehicle; or (c) the activities, omissions or behavior, whether or not negligent, of Contractor, Suppliers, Subcontractors, Mechanics and parties present at the Project Site whether or not Owner was actively or passively negligent, provided that this release shall not release any of Owner, its Affiliates, agents and employees from their willful misconduct or sole negligence and shall not impair the Parties' rights under any available insurance.

## **SECTION 10.3 ENVIRONMENTAL LAWS AND HAZARDOUS MATERIALS**

### **SECTION 10.3.1 Definitions.**

(a) "Environmental Laws" means all present and future federal, state and local laws, statutes, rules, regulations, ordinances, standards, directives, interpretations and conditions of approval, all administrative or judicial orders or decrees and all guidelines, permits, license approvals or other entitlements, or rules of common law pertaining to the protection of the environmental, natural resources, wildlife, human health or safety or employee or community right-to-know requirements related to the Work being performed under the Contract. Environmental Laws specifically include the documents of environmental justice, under which a community or member thereof may claim that it, he or she has been adversely and disproportionately affected by environmental conditions. Environmental Laws also include, but are not limited to, the Project Mitigation Monitoring and Reporting Plan ("Project MMRP"), the Storm Water Pollution Prevention Plan dated October of 2006 ("SWPPP") attached as Exhibit Y; the Bay Area Air Quality Management District's ("BAAQMD") *Naturally-Occurring Asbestos Dust Mitigation Plan, Parcel A' Phase I, Development, Hunters Point Shipyard* revised 5/2009 ("ADMP"); the San Francisco Department of Public Health's ("SFPDH"), *Revised Dust Control Plan for Parcel A' Phase I, Development Hunters Point Shipyard*, dated 2/2007 ("DCP"); and all of the other Plans for Compliance with Article 31 of the City and County of San Francisco Health Code ("Article 31 Plans") as these documents may be amended from time to time).

Article 31 Plans include the following:

- (i) *Revised Dust Control Plan, Parcel A' Phase I Development, Hunters Point Shipyard*, dated 2/2007;
- (ii) *Soils & Importation Materials Plan, Parcel A' Phase I Development, Hunters Point Shipyard*, dated 6/2007;
- (iii) *Contingency Plan for the Management of Abrasive Blast Material & Unknown Hazardous Materials*, dated 4/2005;

- (iv) *Transportation and Disposal Plan, Parcel A' Phase I Development, Hunters Point Shipyard*, dated 4/2005;
- (v) *Sampling & Analysis Plan for Evaluation of Lead-Based Paint in Soils, Parcel A' Phase I Development, Hunters Point Shipyard*, dated 4/2005;
- (vi) *Site Evaluation Report, Parcel A' Phase I Development, Hunters Point Shipyard*, dated 6/2005;
- (vii) *Stormwater Pollution Prevention Plan, Parcel A, Phase I Development Hunters Point Shipyard*.

(b) "Hazardous Material" means any material, waste, chemical, compound, substance, mixture, or byproduct that is identified, defined, designated, listed, restricted or otherwise regulated under Environmental Laws as a "hazardous constituent", "hazardous substance", "hazardous waste constituent", "infectious waste", "medical waste", "biohazardous waste", "extremely hazardous waste", "pollutant", "toxic pollutant", or "contaminant", or any other formulation intended to classify substances by reason of properties that are deleterious to the environment, natural resources, wildlife or human health or safety, including without limitation, ignitability, volatility, explosive risk, infectiousness, corrosiveness, radioactivity, carcinogenicity, toxicity and reproductive toxicity. Hazardous Materials include without limitation any form of natural gas, volatile or semi-volatile organic compound, petroleum products or any fraction thereof, asbestos, asbestos containing materials, polychlorinated biphenyls ("PCBs"), PCB-containing materials, lead, lead-containing materials, any substance that, due to its characteristics or interaction with one or more other materials, wastes, chemicals, compounds, substances, mixtures or byproducts, damages or threatens to damage the environment, natural resources, wildlife or human health or safety, and any chemical listed as a potential carcinogen or reproductive toxin pursuant to California Safety and Health Code Sections 25249.5 et seq. ("Proposition 65").

(c) "Release" means any accidental or intentional spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the air, land, surface water, groundwater or environment of Hazardous Material (including, without limitation, the abandonment or discarding of barrels, containers, and other closed receptacles containing any Hazardous Material).

**SECTION 10.3.3 Compliance with Environmental Laws.** Contractor, at its sole cost and expense, shall comply, and shall ensure that Subcontractors, Mechanics, Suppliers and any others under Contractor's control comply, with all Environmental Laws and utilize best management practices with respect to any Hazardous Material discovered, located, used, deposited or brought on the Project, or released, disposed of, migrated, or transported on, to, under, from or about the Project.

**SECTION 10.3.4** Contractor shall not permit any Hazardous Material to be located, created, used, or incorporated into the Work (or any portion thereof) or brought onto the Project Site in connection with the Work unless (a) it is specifically and expressly required by the Contract Documents, or (b) it is absolutely necessary because no reasonable alternative is available. In such event, the precise nature, quality, storage procedures, and duration of storage of the Hazardous Material must be specified in writing to Owner, the prior written approval of Owner obtained; and Contractor must have provided Owner with Material Safety Data Sheets ("MSDS") sheets for those substances.

**SECTION 10.3.5 Compliance for Hazardous Materials.** Contractor shall be responsible for

providing Owner, Subcontractors and Mechanics, all applicable Governmental Authorities and the public with any notices of disclosures concerning Hazardous Materials used or brought to the Project Site in accordance with the MSDS, which is attached as Exhibit R. Owner can hold any payments otherwise due to Contractor until such documentation is supplied. Owner shall have the right to review such notices and disclosures prior to their distribution or submission by Contractor and shall have the right, but not the obligation, to prescribe the form and content of any such notices or disclosures. Contractor shall immediately identify to Owner in writing all Hazardous Materials used in performing the Work which are discovered during the performance of the Work to have been omitted from any previous notification(s) and promptly provide the MSDS on those Hazardous Materials to Owner. Contractor shall immediately notify Owner if Subcontractor, Mechanic, Suppliers or any entity or person under the control of Contractor, brings a chemical which has been listed on the Governor's list pursuant to Proposition 65 onto the Project Site (a "Listed Chemical") and shall, in addition, provide Contractor with copies of all warning labels on products Subcontractor, Mechanic, Suppliers or any persons or entities under the control of Contractor are using and all warning signs required to be posted on the Project Site. Contractor shall be solely responsible for complying with all requirements imposed by Proposition 65.

**SECTION 10.3.6** Contractor shall be liable for all on- and Off-Site disposal of Hazardous Material brought to, disturbed or created at the Project Site or vicinity thereof by Contractor, Subcontractors or any Mechanics (and shall sign any manifest in connection with the transport or storage of such Hazardous Material) and for any discharge, release, injury to any person, or injury to any property resulting from use of Hazardous Material in the performance of the Work and shall be responsible for obtaining all required permits (unless Owner has agreed to obtain the permits) and approvals necessary to remove such Hazardous Material or otherwise remedy any problem resulting from Contractor's, Subcontractors' and Mechanics' use of Hazardous Material. Contractor shall cause the removal of the Hazardous Material used, created or brought onto the Project Site or the vicinity thereof by Contractor, Subcontractor, Mechanics, Supplier or any entity or person under control of Contractor, when required by any Governing Authority and remedy any associated problems resulting from the use of the Hazardous Material in accordance with the Applicable Laws and prudent business practices provided Owner's prior written approval is obtained. In addition, Contractor shall obtain a certification issued by a recognized and licensed environmental consulting firm indicating that all such Hazardous Material has been thoroughly abated or remediated.

**SECTION 10.3.7 Hazardous Material Discharge or Spills.** Contractor shall immediately notify Owner of any Release of any Hazardous Material caused by or Known by Contractor, whether such Release is the result of an intentional act, negligence, accident or misfortune. As to any Release of a Hazardous Material which is caused by Contractor, Subcontractor, Mechanic, Supplier or any entity under the control of Contractor, whether caused intentionally, negligently or accidentally, Contractor shall immediately take all reasonable and necessary actions to prevent the further spread of any such Release. Contractor shall take any other actions required by any applicable Environmental Laws. Contractor shall take immediate action to remediate such Release in full compliance with all applicable Environmental Laws and any other Applicable Laws and any directions from Owner or Owner's consultants, all at Contractor's sole expense.

**SECTION 10.3.8 Cleaning of Equipment and Tools.** Neither Contractor, Subcontractor, Mechanics, Suppliers or any entity or person under the control of Contractor shall clean any tools, equipment, vehicles, materials or other items in such a manner as to cause a violation of any Environmental Laws. All residue and waste materials resulting from any such cleaning action shall be collected and gathered by Contractor and removed from the Project Site and disposed of in accordance with all Environmental Laws.

**SECTION 10.3.9 Dumping and Disposal.** If any Hazardous Material or Listed Chemical comes to be located on the Project during the Work as a result of illegal or unauthorized disposal or dumping by Contractor, any Subcontractor, Mechanic or Supplier as a result of the Work, or the presence, use, on- or Off-Site disposal or transport of any Hazardous Material on, to, under, from or about the Project results in any Releases of any Hazardous Material, any injury to any person, or any injury or damage to the Project, or if Contractor, Owner or any Governing Authority reasonably suspects that any such spill, release, injury or damage has occurred or is likely to occur, Contractor shall at its sole cost and expense: (a) immediately notify Owner in writing of the Release, injury, or damage and Contractor's intent to remediate such problem; (b) promptly obtain all permits and approvals necessary to remove such Hazardous Material or listed chemical or otherwise remedy any suspected problem; and (c) if Contractor has received all applicable written governmental authorizations, permits, and approvals and Owner's written approval thereof, promptly remove such Hazardous Material and remedy any associated problems to the reasonable satisfaction of Owner, in accordance with all applicable Environmental Laws, and all other Applicable Laws and good business practices.

**SECTION 10.3.10 Asbestos.** Contractor has been advised and acknowledges that serpentinite rock is present at the Project Site that contains naturally occurring asbestos. Contractor will also ensure that all Subcontractors and Mechanics are aware of the presence of serpentinite rock with naturally occurring asbestos on the Project. It is Contractor's responsibility to take, and require that all Subcontractors, Mechanics, Suppliers and any persons or entities under Contractor's control, all applicable precautions and follow all Environmental Laws including but not limited to Article 31 Plans, DCP, ADMP, SWPPP and Project MMRP for Work related to disturbing, removal or handling serpentinite rock. Contractor shall not, and shall ensure that all Subcontractors, Mechanics and Suppliers do not, cause or permit any asbestos-containing manufactured building material to be brought upon or incorporated into the Project. .

**SECTION 10.3.11 Water Quality Compliance.** Contractor shall comply and ensure that all Subcontractors, Mechanics, Suppliers and others performing Work under the control of Contractor, shall comply with all requirements regarding discharges to surface water or groundwater at the Project Site. Water Quality Requirements include, but are not limited to, the SWPPP, storm water permit or general construction permit, Storm Water Compliance Guidelines, federal, state and local stormwater rules, regulations and ordinance, including requirements imposed by Municipal Separate Storm Sewer System entities, Clean Water Act section 404 wetland permits, regulations, mitigation agreements, and streambed alteration agreements. Before beginning any Work, Contractor shall review applicable Water Quality Requirements, copies of which will be available at the Project Site or by request to Owner. Contractor shall implement, and shall require all Subcontractors, Mechanics and Suppliers to comply with, the Best Management Practices ("BMPs"), set forth in the SWPPP, for any Work that is performed on the Project. A copy of the SWPPP, guidelines and permits are available from Owner. Contractor shall ensure that its Project Manager, superintendents and supervisors, are trained in stormwater management practice and BMPs that apply to the Work. Contractor agrees to provide documentation of employee stormwater management training to Owner upon request or if required in the SWPPP. Contractor agrees to participate in any stormwater meetings and to document attendance on forms provided by Owner, if requested.

**SECTION 10.3.12 Air Quality Compliance – Dust Control.** Contractor shall, at its sole expense, comply and ensure that all Subcontractors, Mechanics, Suppliers and any other persons present on the Project Site under Contractor's supervision or control of Contractor, comply with the requirements of federal, state and local air quality and dust control rules, regulations and ordinances including but not limited to local Air Quality Management District ("AQMD"), Rule 403 (governing fugitive dust emissions), and California Code of Regulations Title 17, Section 93015, the Asbestos Airborne Toxic Control Measure for Construction, Grading, Quarrying, and Surface Mining Operations, City and County of San Francisco Order Number 171,378 Rule (the requirements of any

approved fugitive dust emissions control plans prepared by Owner or any other party for the Project (collectively referred to as "**Dust Control Plans**") including the Project MMRP, ADMP, DCP, SWPPP and other Article 31 Plans) and shall take such actions as are necessary to prevent dust, control dust and dust migration from the Project Site in accordance with the Dust Control Plan. To the extent applicable to its Work, Contractor shall fully comply with and implement the Dust Control Plan and best management practices ("**Dust Control BMPs**"), including any dust control measures, devices or work practices, described by the Dust Control Plan or required by the Dust Control Permit. Contractor shall exercise due care not to damage any dust control facilities or violate any Dust Control BMPs at the Project Site in the performance of its Work. If Contractor, Subcontractor, Mechanic or Supplier causes such damage, Contractor shall immediately report the damage to Owner and take appropriate measures to remedy such damage.

#### **SECTION 10.4 ENVIRONMENTAL LAWS - INDEMNITY**

**SECTION 10.4.1** Contractor acknowledges that it has observed the environmental conditions of the Project and has reviewed Article 31 Plans, ADMP, DCP, Project MMRP and SWPPP, and any other wetlands, or endangered species limitations and that Contractor has notice and knowledge of the environmental conditions of the Project Site. If, during the performance of the Work, Contractor discovers or becomes aware of a previously unidentified environmental condition, Contractor shall immediately notify Owner and shall not proceed with any Work that would disturb such environmental condition without Owner's written approval.



Contractor's Initials

**SECTION 10.4.2** Contractor acknowledges that Owner has informational videos and other informative material to assist it in Contractor's responsibility to comply with Article 31 Plans, DCP, ADMP, Project MMRP and SWPPP. Contractor can request these materials as well as meetings with Owner to ensure its compliance with Article 31 Plans, DCP, ADMP, Project MMRP, SWPPP, all permits and any other Environmental Laws.

**SECTION 10.4.3 Indemnity.** Owner shall be entitled to recover from Contractor all fines, fees, expenses and other costs or penalties assessed by any Governmental Authority due to the violation of any Environmental Laws, obligations under all permits and obligations under Section 10.3 by Contractor, Subcontractors, Mechanics, Suppliers and all others performing Work under the control of the Contractor. **TO THE FULLEST EXTENT PERMITTED BY LAW, CONTRACTOR HEREBY AGREES TO INDEMNIFY, DEFEND AND HOLD HARMLESS THE INDEMNIFIED PARTIES FROM AND AGAINST ANY AND ALL CLAIMS, DAMAGES, ATTORNEYS' FEES, EXPENSES, OR LIABILITIES OF ANY TYPE OR NATURE, INCLUDING, WITHOUT LIMITATION, ANY AND ALL FINES OR OTHER PENALTIES, CIVIL OR CRIMINAL, ARISING OUT OF ANY VIOLATION OF ALL PERMITS, THE VIOLATION OF, OR FAILURE TO COMPLY WITH, ANY OBLIGATION SET FORTH IN SECTION 10.4 AND ANY VIOLATIONS OF ENVIRONMENTAL LAWS CAUSED IN WHOLE OR IN PART BY THE ACTS, ERRORS, OR OMISSIONS OF CONTRACTOR, SUBCONTRACTOR, MECHANICS, SUPPLIERS, AND OTHERS PERFORMING WORK UNDER THE CONTROL OF THE CONTRACTOR, EXCEPT TO THE EXTENT THE CLAIMS ARE CAUSED BY THE WILLFUL MISCONDUCT OR SOLE NEGLIGENCE OF THE INDEMNIFIED PARTIES.**



**SECTION 10.4.4** Contractor acknowledges that failure to adhere to the requirements of the Environmental Laws and any related permits, constitute a material default of its contractual obligations herein, and Owner may, without prejudice to any other right or remedy, remove Contractor from the Project Site, terminate the Agreement, and retain a separate contractor to complete Contractor's obligations in this Contract.

**SECTION 10.4.5** Without limiting any of its other rights or remedies provided elsewhere in the Contract, Owner may withhold or offset from any payment due to Contractor, or otherwise recover from Contractor: (i) the costs to repair or replace any dust control facilities or environmental control measures damaged by Contractor; and (ii) the costs of all fines, fees, expenses and other penalties sought against or incurred by Owner, due in whole or in part, to Contractor's violations of the obligations in Section 10.3, Environmental Laws, and any permits. Failure to satisfy the obligations in Section 10.3 shall be deemed a material default of the Contract and Owner may withhold any payments due to Contractor under the Contract otherwise due to until Contractor has remedied its failures and/or Owner may terminate the Contract and withhold payments otherwise due and retain a separate contractor to complete Contractor's obligations at Contractor's expenses.

## **ARTICLE 11 INSURANCE**

### **SECTION 11.1 BUILDER'S RISK INSURANCE**

Owner shall purchase and maintain Builder's Risk insurance for the Project using "Special Causes of Loss" or an equivalent form with replacement cost, in an amount at least equal to the estimated cost of all material and equipment at the Project Site that is to become a permanent part of the completed Project. This insurance shall insure against the perils of fire and extended coverage and physical loss or damage including, without duplication of coverage, theft, vandalism, malicious mischief, collapse, and debris removal including demolition. Owner shall be responsible for all premiums.

**SECTION 11.1.1 Excluded Items.** This insurance will not include Contractor's, Subcontractors', Mechanics', Suppliers' or any other's temporary structures, materials, supplies, tools, clothing of workers, equipment, protective fencing, scaffolding, and equipment owned, rented, leased, in the performance of the Work, materials or equipment while stored at any Off-Site property storage location or while in transit to the Property or any other property which is not intended to become a permanent part of the completed Project. Contractor, Subcontractors, Mechanics', Suppliers and others (exclusive of Owner) are solely responsible for those items and losses. Notwithstanding anything to the contrary in this Section 11.1.1, the Builder's Risk Insurance shall cover materials, supplies, tools, equipment, or any other property to the extent of Owner's interest therein, whether such materials, supplies, tools, equipment or property are located on or off the Project Site.

**SECTION 11.1.2 Deductible.** This insurance shall contain a Ten Thousand (\$10,000) per occurrence deductible. Where the loss covered by the Builder's Risk policy is caused by Contractor, Subcontractors, Mechanics, or any other persons or entities performing Work for Contractor at the Project, Contractor is responsible for the deductible. Otherwise, Owner is responsible for the deductible. Owner may back charge Contractor, may withhold from monies otherwise owing to Contractor under this Contract or any other contract for Hunters Point Shipyard projects, or may collect by any other lawful means, the amounts owed by Contractor under this Section. Contractor's obligation under this Section is uninsured and is not to be covered by the OCIP.

**SECTION 11.1.3 Policy Term.** The policy shall be maintained from the Date of Commencement through to the date stated in the policy.

## **SECTION 11.2 COMMERCIAL GENERAL LIABILITY INSURANCE - OCIP**

**SECTION 11.2.1 General.** Owner has arranged with Aon Risk Service West ("Program Administrator") to obtain Commercial General Liability ("CGL") and excess liability insurance known as the Owner Consolidated Insurance Program ("OCIP"), with response to the Work to be performed pursuant to the Contract. The terms and conditions of the OCIP are stated in Exhibit S, the OCIP Addendum - Agreement between Owner and General Contractor, General Liability Owner Controlled Insurance Program, attached hereto, Exhibit S-1, OCIP Addendum - Subcontractor Agreement between Contractor and Subcontractor, General Liability Owner Controlled Insurance Program; Exhibit S-2, California Civil Code Section 2782.95 Wrap Up Disclosure; and Exhibit S-3, the Self-Insured Obligation Schedule Subcontractor Risk Level. Contractor agrees to comply with, and shall require all other Subcontractors and their Sub-tier Subcontractors to comply with all of the applicable terms set forth in Exhibits S through S-3, and the terms of the OCIP.

### **SECTION 11.2.2 Insurance Definitions.**

(a) **"Eligible Parties"** are defined as Owner, Contractor, Subcontractors and their Sub-tier Subcontractors (if any), unless an Excluded Party.

(b) **"Enrolled Parties"** are defined as all Eligible Parties that enroll in the OCIP. The term Enrolled Parties includes Enrolled Subcontractors.

(c) **"Enrolled Subcontractors"** are defined as Subcontractors which are enrolled in the OCIP.

(d) **"Excluded Parties"** are defined as those parties that are ineligible for the OCIP. They include: (1) consultants; architects; surveyors; engineers; soil testing engineers; quality inspectors; hazardous materials removal and/or transport companies and their consultants; mold or pollution remediation/treatment; suppliers; fabricators; material dealers; and truckers, haulers, drivers and others who merely transport, pickup, deliver, or carry materials, personnel, parts or equipment or any other items or persons to or from the Project; (2) contractors and subcontractors and each of their respective sub-tier contractors and subcontractors who do not perform construction related labor or Work at the Project and manufacturers of materials offsite, provide temporary equipment, safety equipment, barricade services, SWPPP related work; and alike; and (3) any parties or entities specifically excluded by Owner in its sole discretion, even if otherwise eligible or apparently eligible.

(e) **"Sub-tier Subcontractors"** are defined as anyone or entity performing any of the Work at the request of any Subcontractors.

(f) **"Unenrolled Party"** is defined as (i) any Subcontractors, Sub-tier Subcontractor or any other entity or person that is an Eligible Party but has not enrolled under the OCIP or (ii) any Excluded Party.

## **SECTION 11.3 REQUIRED INSURANCE COVERAGES FOR CONTRACTORS AND SUBCONTRACTORS**

**SECTION 11.3.1** Contractor shall and shall require each Subcontractor, throughout the term of the Agreement or in the case of a Subcontractor, the term of the Subcontract, and up to the expiration of the Residential Warranty Period, or longer as required below, to procure and maintain in full force and effect, at its sole cost and expense, the following insurance with limits not less than specified herein or as required by law, whichever is greater:

### **(a) Workers' Compensation Insurance**

(i) **Minimum Scope and Limits.** Workers' Compensation Insurance with Employer's Liability insurance with limits of the following:

Coverage A. Statutory Benefits - State of Hire	
Coverage B. Employers' Liability of not less than:	
Bodily Injury by accident	\$1,000,000 each accident
Bodily Injury by disease	\$1,000,000 policy limit
Bodily Injury by disease	\$1,000,000 each employee

(ii) **Waiver of Subrogation.** Coverage must contain a waiver of subrogation endorsement providing that each insurer waives any rights of recovery by subrogation, or otherwise, against 'Owner; all subsidiary or Affiliated companies; The Shipyard Communities, LLC; HPSCP Opportunities, LP; HPS Development Co., LP; CP Development Co., LP; CP/HPS Development Co. GP, LLC; HW SF LLP; Scala SF Investor, LLC; Lennar - BVHP, LLC; LHCHPS I, LLC; and Lennar Corporation, including each of their respective subsidiaries, partners, partnerships, affiliated companies, successors and assigns; the Agency Parties; and all others performing Work or services on the Project Site. A waiver of subrogation shall be effective as to any individual or entity even if such individual or entity (i) would otherwise have a duty of indemnification, contractual or otherwise, (ii) did not pay the insurance premium directly or indirectly, and (iii) does or does not have an insurable interest in the property damaged.

### **(b) Automobile Liability**

Insurance to include coverage equivalent in scope to ISO form CA 00 01 with not less than \$1,000,000 combined single limit, each accident covering all owned, hired and non-owned autos. If Contractor or Subcontractor does not have any company-owned vehicles, a copy of the declaration page from the personal auto liability policy of the principal(s) of Contractor or each Subcontractor making such claim will be acceptable. Hired and non-owned auto coverage of Contractor and each Subcontractor must be evidenced through a general liability policy or auto policy.

### **(c) Commercial General Liability For Enrolled Parties for Off-Site Work.**

(i) **Minimum Limits.** For Off-Site Work, which is defined as Work or services performed away from the Project Site, including but not limited to products manufacturing, assembly or otherwise performed at the Contractor's or Subcontractors' permanent or temporary premises or yards, the Commercial General Liability coverage (equivalent in coverage to ISO form CG 00 01) for bodily injury and property damage, shall not be less than:

Each Occurrence Limit	\$1,000,000
Personal Advertising Injury Limit	\$1,000,000
General Aggregate Limit	\$1,000,000

(ii) **Minimum Scope.** The policy must include the following provisions:

1. Standard ISO CG0001 10 01 Contractual Liability coverage, or its equivalent.
2. Separation of Insureds clause.
3. Broad Form Property Damage coverage.
4. An Additional Insured Endorsement (equivalent to ISO form CG 20 10 11 85 or ISO form CG 20 10 10 02 (or earlier edition form), plus ISO form CG 2037 10 01) naming as additional insured: the Owner; Owner's Affiliates; The Shipyard Communities, LLC; HPSCP Opportunities, LP; HPS Development Co., LP; CP Development Co., LP; CP/HPS Development Co. GP, LLC; HW SF LLP, Scala SF Investor, LLC; Lennar - BVHP, LLC; HCHPS, LLC; and Lennar Corporation, including each of their respective subsidiaries, partners, partnerships, affiliated companies, successors and assigns; and the Agency Parties.
5. A Waiver of Subrogation, to apply in favor of all those parties set forth in Section 11.3.1 (c)(i)(4) above.
6. Coverage must be on an "occurrence" form. "Claims Made" and "Modified Occurrence" forms are not acceptable.
7. Such coverage as is afforded by this policy for the benefit of the additional insured(s) is primary and any other coverage maintained by such additional insured(s) shall be non-contributing with the coverage provided under this policy.
8. Premises and Operations coverage with no explosions, collapse, or underground damage exclusion (XCU).
9. The CGL policy may not be subject to a self-insured retention ("SIR") or deductible that exceeds \$25,000. In the event Owner has been notified of a claim arising from the Project, Owner may deduct from any amounts otherwise due Contractor to fund the SIR/deductible. In the event the amounts owed to Contractor is insufficient to meet the SIR/deductible or the Project is completed, Owner shall be entitled to deduct the remaining balance of the SIR/deductible from amounts owed to Contractor for its Work on other Hunter Point Shipyard projects. If any policy is subject to a SIR, then such SIR shall contain or be endorsed to provide that the SIR may be satisfied through payments made by (a)

the named insured, or (b) Owner or (c) any additional insureds, co-insurers, and/or insureds other than the First Named Insured. The policy must also state that the Allocated Loss Adjustment Expenses will satisfy the SIR or deductible.

**(d) Commercial General Liability For Unenrolled Subcontractors.**

(i) **Minimum Limits.** Unenrolled Parties are required to obtain CGL insurance coverage based upon their Risk Factor as set forth in **Exhibit S-3** with CGL coverage (equivalent in coverage to ISO form CG 00 01) for bodily injury and property damage, shall not be less than:

	Low Risk	High Risk
Each Occurrence	\$1,000,000	\$1,000,000
Personal Advertising Injury Limit	\$1,000,000	\$1,000,000
Products/Completed Operations Aggregate Limit	\$1,000,000	\$2,000,000
General Aggregate Limit (other than Products/Completed Operations)	\$1,000,000	\$2,000,000

(ii) **Minimum Scope.** The policy must include the following provisions:

1. Standard ISO CG0001 10 01 Contractual Liability coverage, or its equivalent.
2. Separation of Insureds clause.
3. Broad Form Property Damage coverage, including completed operations, or its equivalent.
4. An Additional Insured Endorsement (equivalent to ISO form CG 20 10 11 85 or ISO form CG 20 10 10 02 (or earlier edition form), plus ISO form CG 2037 10 01) naming as additional insured: the Owner; Owner's Affiliates; The Shipyard Communities, LLC; HPSCP Opportunities, LP; HPS Development Co., LP; CP Development Co., LP; CP/HPS Development Co. GP, LLC; HW SF LLP, Scala SF Investor, LLC; Lennar - BVHP, LLC; HCHPS, LLC; and Lennar Corporation, including each of their respective subsidiaries, partners, partnerships, affiliated companies, successors and assigns; and the Agency Parties.
5. A Waiver of Subrogation, to apply in favor of all those parties set forth in Section 11.3.1 (d)(i)(4) above.

6. Coverage must be on an "occurrence" form. "Claims Made" and "Modified Occurrence" forms are not acceptable.
7. Such coverage as is afforded by this policy for the benefit of the additional insured(s) is primary and any other coverage maintained by such additional insured(s) shall be non-contributing with the coverage provided under this policy.
8. Premises and Operations coverage with no explosions, collapse, or underground damage exclusion (XCU).
9. There shall be no exclusion for attached, residential or condominium projects.
10. Products and Completed Operations coverage shall be maintained for the longer of (a) ten (10) years following completion of the Contractor's Work or in the case of Subcontractors', the Subcontractors' Work; and (b) the applicable statute of limitations and/or repose for the jurisdiction of the Project.
11. There shall be no exclusion for subsidence.
12. There shall be no "pollution" exclusions or its equivalent.
13. The CGL policy may not be subject to a SIR or deductible that exceeds \$25,000. Owner may deduct from any amounts otherwise due Contractor to fund the SIR/deductible. In the event the amounts owed to Contractor is insufficient to meet the SIR/deductible or the Project is completed, Owner shall be entitled to deduct the remaining balance of the SIR/deductible from amounts owed to Contractor for its Work on other projects. Any and all SIRs must be susceptible of being satisfied under the CGL policy through payments made by additional insureds, co-insurers, and/or insureds other than the First Named Insured. The policy must also state that the Allocated Loss Adjustment Expenses will satisfy the SIR or deductible.

**(c) Professional Liability Insurance.**

1. **Minimum Limits.** If Contractor or any Subcontractors perform or contracts to perform any Design/Build Work at the Project Site, such Contractor or Subcontractor must have Professional (Errors and Omissions) Liability insurance in limits not less than \$2,000,000 each claim and in the Aggregate, with a deductible or SIR amount not greater than \$50,000.
2. **Minimum Scope.** Such insurance shall include prior acts coverage sufficient to cover the Work and Contractual Liability to cover liability assumed under the Contract. Such policy may be written on a "claims made" basis provided that the policy has a retroactive date of placement prior to or coinciding with the commencement of any professional services performed on any part of the Work and is to be maintained during the term of the Contract or

Subcontract, in the case of Subcontractors, and for a period of ten (10) years after Substantial Completion of the Project. There shall be no exclusion for attached, residential or condominium projects. Such Contractor or Subcontractor performing Design/Build Work is required to obtain evidence to Owner that their current Professional Liability policy has no impairment on the aggregate limits before commencing any Design/Build Work.

(f) **Property Insurance.**

1. Contractor and Subcontractors are required to maintain Property Insurance coverage for physical damage (including loss of use therefrom), of their property, supplies and equipment (whether or not owned by them) which are not covered under the Owner's Builder's Risk insurance policy. The policy should be maintained for the duration of this Contract, or in the case of Subcontractors, their subcontracts, and shall continue until the Project is delivered to the Owner.

2. **Required Waivers.** The Contractor and Subcontractors shall have no recourse, and waive all rights of recovery, against the Indemnified Parties (and any persons or entities claiming through them) for any physical damage to any property, supplies or equipment of the Contractor or the Subcontractors. Each policy shall contain a provision requiring the insurance carriers to waive their rights of subrogation against the Indemnified Parties (and all persons or entities claiming through them), and against any other Contractor or Subcontractor for any monies paid under the said insurance policies. Each Contractor and Subcontractor shall cause its insurance carriers to consent to such waiver of subrogation.

3. **Additional Insureds.** The policy shall name Owner, all subsidiary or Affiliated companies of Owner; The Shipyard Communities, LLC; HPSCP Opportunities, LP; HPS Development Co., LP; CP Development Co., LP; CP/HPS Development Co. GP, LLC; HW SF LLC; Scala SF Investor, LLC; Lennar - BVHP, LLC; LHCHPS I, LLC; and Lennar Corporation, including each of their subsidiaries, partners, partnerships, affiliates, successors and assigns, and the Agency Parties as an additional insureds and loss payees on the property insurance policies in connection with any material stored Off-Site by the Contractor and/or Subcontractor.

4. In the event that materials or any other type of personal property of Contractor is acquired for the Project or delivered to the Project Site, Contractor agrees that it shall be solely responsible for such property until it becomes a fixture on the Project, or otherwise is installed and incorporated as a final part of the Project. Such responsibility shall include, but not be limited to, theft, fire, vandalism, and use, including use by unauthorized persons.

5. **Rental Property.** In the event that rental of equipment is undertaken to complete and/or perform the Services, Contractor agrees that it shall be solely responsible for such rental equipment. Such responsibility shall include, but not

be limited to, theft, fire, vandalism and use, including use by unauthorized persons.

(g) **Contractors Pollution Liability Insurance.**

If Contractor or Subcontractors will be performing any environmental remediation work or does any Work that involves disturbance of (i) soil where Hazardous Materials are known to be located; (ii) groundwater; (iii) lead-paint; (iv) asbestos containing materials; or (v) the removal, transportation and disposal of Hazardous Material (collectively, "Pollution Work"), the Contractor shall, or shall require its Subcontractor to carry the following insurance coverages or provisions:

1. **Coverages.** Contractors pollution liability insurance applicable to Pollution Work with limits of not less than \$5,000,000 for each claim or occurrence and in the aggregate per policy period of one year. If such activity involves lead-based paint or asbestos identification / remediation, such insurance shall not contain lead-based paint or asbestos exclusions.

2. **Claims Made Forms.** The Contractors Pollution Liability coverages may be written on a claims made form.

3. The retroactive date must be shown, and must be before the effective date of the Contractor the date that the Pollution Work commences, whichever is later.

4. Insurance must be maintained and evidence of insurance must be provided until the date that is ten (10) years after the completion of the Pollution Work.

5. A copy of the claims reporting requirements must be submitted to Owner for review.

6. **Self-Insured Retentions.** Any Contractors Pollution Liability insurance policy containing a SIR greater than Two Hundred and Fifty Thousand Dollars (\$250,000) shall be disclosed to the Owner and shall be subject to the Owner's reasonable approval. If any policy is subject to a SIR, then such SIR shall contain or be endorsed to provide that the SIR may be satisfied through payments made by (a) the named insured, or (b) Owner or (c) any additional insureds, co-insurers, and/or insureds other than the First Named Insured. The policy must also state that the Allocated Loss Adjustment Expenses will satisfy the SIR or deductible.

7. Such Contractors Pollution liability policies are primary insurance to any other insurance available to the additional insureds, with respect to any claims arising out of the Agreement and Subcontractors' subcontracts. Such policies shall also provide for severability of interests.

8. Owner, all subsidiary or Affiliated companies of Owner; The Shipyard Communities, LLC; HPSCP Opportunities, LP; HPS Development Co., LP; CP Development Co., LP; CP/HPS Development Co. GP, LLC; HW SF LLC; Scala SF Investor, LLC; Lennar - BVHP, LLC; LHCHPS I, LLC; and Lennar



Corporation, including each of their subsidiaries, partners, partnerships, affiliates, successors and assigns, and the Agency Parties shall be covered as additional insureds.

#### **SECTION 11.4 GENERAL INSURANCE REQUIREMENTS FOR CONTRACTOR AND SUBCONTRACTORS**

**SECTION 11.4.1** All insurance required under Article 11, with the exception of the coverage provided under the OCIP for the Enrolled Parties, shall be obtained at the sole cost and expense of Contractor and/or Subcontractors, and shall be maintained with insurance carriers properly licensed to do business in the California having a general rating of not less than an "A(-)" and financial rating of not less than at least an "VII" as rated in the most recent edition of A.M. Best's Insurance Reports or, if not rated by A.M. Best, then a comparable rating from a nationally recognized rating agency approved by the Owner. Contractor agrees to provide to Owner a full certified copy of any policy maintained by Contractor at Owner's request, and require the same of the Subcontractors.

**SECTION 11.4.2** If Contractor fails to secure and maintain the required insurance, Owner shall have the right (without any obligation to do so) to secure same in the name and for the account of Contractor in which event Contractor shall pay the costs thereof and furnish upon demand all information that may be required in connection therewith. Owner shall notify Contractor if Owner exercises its right, whereupon Contractor's responsibility to carry such insurance shall cease and all the premiums and other charges associated with such insurance shall be refunded to Owner. Owner further reserves the right at any time, with thirty (30) days' written notice to Contractor, to require that Contractor resume the procurement and maintenance of any insurance for which Owner has elected to procure pursuant to this subsection; in such event, the sums paid to Contractor by Owner shall increase to the extent of any previously agreed and implemented reduction (as noted above) attributable to Owner's prior assumption of the particular insurance coverages. Such refund shall be equitably prorated based upon Contractor's completed Work at the time of such adjustment.

**SECTION 11.4.3** All insurance policies must provide per the terms and conditions of the insurance policies a thirty (30) days' written notice to Owner of any cancellation, non-renewal or modification of any such policies and a ten (10) days' notice of cancellation for non-payment of premium to Owner. Contractor shall and shall require all Subcontractors to shall provide Owner with a copy of any notice of reduction or cancellation that they receive within five (5) Business Days of receipt of such notice. Contractor and each Subcontractor shall supply Owner with updated replacement certificates of insurance and/or copies of insurance policies that evidence the continuation of all of the terms and conditions of the coverage, limits of protection, and scope of coverage as required by Article 11.

**SECTION 11.4.4** No act or omission of any insurance agent, broker or insurance company representative shall relieve Contractor of any of its obligations under the Contract.

**SECTION 11.4.5** Neither Contractor nor Subcontractors shall not take any actions that would suspend or invalidate any of the required coverages during the time period such coverages are required to be in effect.

**SECTION 11.4.6** Each insurance policy shall provide that any failure to comply with reporting provisions of the policies by Contractor shall not affect coverage provided to Owner and all additional insureds.

**SECTION 11.4.7 No Limitations on Coverage.** The insurance limits set forth in this Contract are minimum levels of insurance only and nothing herein should be construed to limit the actual limits of insurance obtained by Contractor or Subcontractors. Should the Contractor or Subcontractors obtain limits and coverages in excess of the minimum insurance requirements contained herein, then the limits in the policy shall apply.

**SECTION 11.4.8** The Certificates of Insurance shall state "All Operations" of Contractor performed on behalf of Owner shall be covered by such insurance.

**SECTION 11.4.9** Owner reserves the right, in its sole discretion, to require higher limits of liability coverage if, in Owner's opinion, operations by or on behalf of Contractor create higher than normal hazards, and, to require Contractor to name additional parties in interest to be Additional Insureds, and included in any required Waiver of Subrogation, Notice of Cancellation, or other endorsement. If Owner exercises the right to require higher limits, Owner and Contractor shall negotiate an equitable adjustment through a Change Order.

**SECTION 11.4.10** Nothing in this Article 11 shall reduce Contractor's obligations under the Contract. Contractor's (or Subcontractors') procurement and/or maintenance of insurance shall not be construed as a limitation of liability or as full performance of the indemnification and hold harmless provisions of the Contract.

**SECTION 11.4.11 Certificates of Insurance.** Neither Contractor, any Subcontractor nor Sub-tier Subcontractor shall commence any Work on the Project Site including, without limitation, bringing any equipment or personnel onto the Project Site, until such time as Owner has received, reviewed and approved evidence satisfactory to Owner that all mandatory insurance as specified in Article 11 has been obtained by such parties and that such insurance is in form and substance satisfactory to Owner. Prior to the commencement of the Work, Contractor, each Subcontractors and Sub-tier Subcontractor are required to provide certificates of insurance to Owner as evidence that policies specified in this Article 11 are in full force and effect. Acceptance and/or approval by Owner of the insurance herein shall not be construed to relieve Contractor, Subcontractor, or Sub-tier Subcontractors from any obligations, responsibilities or liabilities under the Contract. Certificates of insurance will be labeled and addressed as follows:

Lennar Urban  
Hunters Point Project  
One California Street, Suite 2700  
San Francisco, CA 94105

**SECTION 11.4.12 Waiver of Right to Recovery.** Contractor, Subcontractors and Sub-tier Subcontractors (whether enrolled in the OCIP or not) hereby waive all rights of recovery by subrogation, because of deductible or self-insured retention clauses, inadequacy of limits of any insurance policy, limitations or exclusions of coverage, and for any other reasons, against each other, Owner and OCIP Administrator, and their Affiliates, officers, directors, agents, and employees, and any other contractor, Subcontractor or other individual or entity performing work or rendering services on behalf of Owner in connection with the Project.

**SECTION 11.5 Subcontracts.** Contractor will include substantially identical language contained in Article 11, including but not limited to coverage limits, waivers, requirements that Owner and its affiliates and the Agency Parties be named as additional insureds into all subcontracts and assure each Subcontractor's compliance with the requirements of the OCIP and the requirements of Article 11. In no event, shall the insurance provisions in the subcontract be less inclusive or stringent than those stated in Article 11. Contractor is required and agrees to ensure that all subcontracts with Eligible Parties include Exhibit S-1, Exhibit S-2, and Exhibit S-3.

## **ARTICLE 12 PERFORMANCE BOND AND PAYMENT BOND**

### **SECTION 12.1 FAITHFUL PERFORMANCE BOND**

**SECTION 12.1.1** Contractor shall acquire, as a Cost of the Work, faithful performance bonds for Owner's benefit. Contractor may, but is not required to obtain faithful performance bonds from all Subcontractors. However, Contractor is prohibited from requesting and obtaining faithful performance bonds from any BVHP Area Contractors, as defined in the Community Benefits Plan attached to the VDDA.

**SECTION 12.1.2** All required faithful performance bonds for Contractor shall be issued by a surety company listed in the Federal Register, acceptable to Owner and authorized to do surety business in the State in which the Project is located whose rating in the most recent Best rating guide is not less than B(+) in a form satisfactory to Owner ("Surety"), securing the faithful performance by the principal of all its obligations under the Contract Documents, in an amount not less than the value of the Work remaining to be performed.

**SECTION 12.1.3** The premium for any faithful performance bond required by Owner shall be included as a separate line item in the Schedule of Values. The cost of the performance bond is not an included Cost of the Work for purposes of calculating Contractor's Fee.

**SECTION 12.1.4** Owner may recover upon the faithful performance bond an amount equal to Owner's cost or expense of curing or attempting to cure any breach of the Contract Documents in accordance with the terms of such faithful performance bond and after receipt of Owner's written request that Contractor cure such breach, or immediately upon the breach of the Contract Documents by Contractor, if Contractor is incapable of curing such breach. Owner may also recover upon the faithful performance bond in accordance with the terms of such faithful performance bond and upon Owner's receipt of Contractor's written notice to cease performing the Work pursuant to the terms of the Contract Documents, in an amount equal to (i) the difference between (1) the sum of the costs of completing the Work, re-letting the Work or both, and (2) the unpaid portion of the GMP which represents unperformed Work, plus (ii) the amount of any damages to which Owner is entitled by reason of the failure of Contractor to perform the Work together with a reasonable reserve for cleaning up the Project Site and the Work.

### **SECTION 12.2 LABOR AND MATERIAL PAYMENT BOND**

**SECTION 12.2.1** Contractor shall acquire, as a Cost of the Work, labor and material payment bonds for Owner's benefit covering all Subcontractors. Contractor agrees that it will not obtain any labor and material payment bonds to the extent prohibited in the Community Benefits Plan attached to the VDDA.

**SECTION 12.2.2** The labor and material payment bond for Contractor shall be an amount not less than one hundred percent (100%) of the GMP (as it may be adjusted by duly authorized Change Orders in accordance with Article 8), or one hundred percent (100%) of the contract value for any Subcontractor.

**SECTION 12.2.3** The premium for any labor and material payment bond shall be included in the "Bond" line item in the Schedule of Values. The cost of any labor or material payment bond is not an included Cost of the Work for purposes of calculating Contractor's Fee.

## **SECTION 12.3 SURETY**

**SECTION 12.3.1** Waiver. Every bond under this Article 12 must display the Surety's Bond Number.

**SECTION 12.3.2 Contractor to Keep Surety Informed.** Contractor shall keep the Surety informed of the progress of the Work, and, where necessary, obtain the Surety's consent to, or waiver of, (i) notice of changes in the Work, (ii) request for reduction or release of retention, (iii) request for final payment, and (iv) any other item required by the Surety. Owner may, in Owner's sole discretion, inform the Surety of the progress of the Work and obtain consents as necessary to protect Owner's rights, interest, privileges, and benefits under and pursuant to any bond issued in connection with the Work.

**SECTION 12.3.3** Upon the request of any person or entity appearing to be a potential beneficiary of bonds covering payment of obligations arising under the Contract, Contractor shall promptly furnish a copy of the bond(s) or shall authorize a copy to be furnished.

## **ARTICLE 13 UNCOVERING WORK**

### **SECTION 13.1 UNCOVERING OF WORK**

**SECTION 13.1.1** Contractor shall notify Owner and Architect at least five (5) Business Days before it covers-up work that is required to be examined pursuant to the Contract Documents, Governing Authority, or Owner's Quality Assurance Program (attached as Exhibit "T"), or which has been requested to remain open by Owner, Architect or Owner's consultants. If a portion of the Work is covered without such notification, it must, if requested in writing by Owner, Architect, or Owner's consultants be uncovered for examination and be replaced at Contractor's expense without change in the Contract Time or Contract Sum.

**SECTION 13.1.2** If a portion of the Work has been covered that Owner or Architect has not specifically requested to examine prior to its being covered, or should have been examined pursuant to the Contract Documents, Governing Authorities, or Owner's Quality Assurance Program, Owner or Architect may request to see such Work and it shall be uncovered by Contractor. If such Work is in accordance with the Contract Documents, costs of uncovering and replacement shall, by appropriate Change Order, be at Owner's expense. If such Work is not in accordance with the Contract Documents, such costs and the costs of correction shall be at Contractor's expense unless the condition was caused by Owner or a separate contractor in which event Owner shall be responsible for payment of such costs.

**ARTICLE 14**  
**QUALITY ASSURANCE AND MEETINGS**

**SECTION 14.1 QUALITY ASSURANCE**

**SECTION 14.1.1** Contractor shall comply with the requirements of Owner's Quality Assurance Program in accordance with the provisions of attached Exhibit T and the Specifications. Contractor shall have no liability for any third-party quality assurance programs undertaken by Owner, but Contractor shall take all actions reasonably necessary to coordinate Contractor's performance of the Work with Owner's Quality Assurance Program and any third-party inspections, including but not limited to contacting the inspectors in a timely manner to permit them to inspect portions of the Work that are required to be examined to assure compliance with the Quality Assurance Program. Contractor also shall comply with the requirements of the Quality Assurance Program and the reporting requirements imposed thereby, including the requirements in this Contract related to performance of corrective work.

**SECTION 14.1.2** Owner will pay for the services of the consultants and inspectors for its Quality Assurance Program and all Governing Authorities' inspectors (including Department of Building inspections), except as provided in Section 14.1.7. Contractor shall be copied on any and all reports, written documents or photographs issued or generated by such consultants.

**SECTION 14.1.3** Contractor shall at all times furnish to Owner, Owner's Quality Assurance Program inspectors, and all Governing Authorities' inspectors, ample facilities for inspecting materials at the Project Site or at Contractor's shops or any place where Project materials may be in the course of preparation, process, manufacture or treatment. Contractor shall also conduct its own inspections to ensure that the Work and all materials brought onto the Project Site comply with the Contract Documents and are otherwise free of defects. On-site inspection by Owner, its inspectors or Governing Authorities, or any of them, shall not in any way relieve Contractor from carrying out its inspections or its responsibility for supervising all portions of the Work and for correcting all Defective Work.

**SECTION 14.1.4** Contractor shall further furnish to Owner, Owner's Assurance Program inspectors and all Governing Authorities' inspectors (collectively, these inspectors are referred to as "Inspectors"), as often as reasonably required by Owner, full reports of the progress of the Work at any place where materials under the Agreement may be in the course of preparation, manufacture or storage. These reports shall show the progress of such preparation and manufacture as may be required by Owner, including any Drawings, Specifications, or diagrams in the course of preparation.

**SECTION 14.1.5** Contractor shall communicate directly with the Inspectors and shall give the Inspectors timely advance notice of when and where tests and inspections are to be made so that Inspectors may be present for such procedures.

**SECTION 14.1.6** Contractor shall also arrange and attend all tests, inspections or approvals of the Work required by any Governing Authorities' and Owner's Assurance Program in a manner so as to cause no delay or sequencing in the Work.

**SECTION 14.1.7** Costs arising from failed tests shall be borne by the party responsible for passing the test that failed. If any test, inspection, or approval reveals defective Work, all costs associated with any required corrections to any such defective Work and any required repeated test, inspection or approval process shall be borne solely by Contractor and shall not be included within the Cost of the Work nor adjust the Contract Time.

**SECTION 14.1.8** Required certificates of testing, inspection or approval shall, unless otherwise required by the Contract Documents, be secured by the Contractor and promptly delivered to the Architect.

**SECTION 14.1.9** Contractor shall provide Owner, its representatives, Architect, Owner's consultants, Inspectors and representatives of the Agency and City reasonable right of access to the Project Site.

## **SECTION 14.2 MEETINGS**

**SECTION 14.2.1** To facilitate the progress of the Work to assure timely completion of the Work, Contractor shall meet and confer with Owner, Architect or any others as requested by Owner necessary to assist in scheduling and coordinating the Work as often as reasonable, but no less than once a week. Contractor shall prepare and maintain meeting minutes in such form Owner deems necessary or desirable and deliver the minutes to Owner within five (5) Business Days after each meeting. Owner, may, within five (5) Business Days after Contractor's receipt of such meeting minutes, clarify or objection to any matter set forth in the meeting minutes. Owner's failure to clarify or object shall not does not conclusively deem that the minutes accurately portray the discussions of the meetings.

## **ARTICLE 15 TERMINATION OF THE CONTRACT**

### **SECTION 15.1 TERMINATION BY CONTRACTOR**

**SECTION 15.1.1** Contractor may terminate the Contract if the Work is stopped for a period of sixty (60) consecutive days through no act, failure to act or fault or culpability of Contractor, any Subcontractor or any Mechanic, for any of the following reasons:

- (a) issuance of an order of a court or other public authority having jurisdiction which requires all Work to be stopped; or
- (b) an act of government, such as a declaration of national emergency which requires all Work to be stopped; or
- (c) Owner has not made full payment on an Application for Payment for all sums not in dispute within the time stated in the Contract Documents; or
- (d) Owner has failed to furnish Contractor within fifteen (15) Business Days, after Contractor's written request thereto, reasonable evidence or assurances as required by Section 2.2.1.

**SECTION 15.1.2** Contractor may terminate the Contract if, through no act, failure to act or fault or culpability of Contractor or any Subcontractor or Mechanic, repeated suspensions, delays or interruptions of the entire Work by Owner not otherwise permitted under the Contract Documents constitute in the aggregate more than one hundred and fifty (150) days.

**SECTION 15.1.3** Prior to termination by Contractor, Contractor will not delay or suspend the Work in any way. Except as expressly provided in Sections 15.1.1 and 15.1.2, Contractor expressly agrees that no default, act or omission of Owner will entitle Contractor to cancel or rescind the Contract or to suspend or abandon its performance of the Work, or to seek injunctive relief of any kind. Contractor acknowledges that it can be adequately compensated by monetary damages for any breach of the Contract which may be committed by Owner. Contractor shall look solely to the property of Owner upon which the Project is being constructed, including any improvements located thereon, for the payment of any claims against Owner. Neither the shareholders, members, agents, employees or partners of Owner, nor any person or entity holding any interest in Owner, as the same may from time to time appear, jointly and severally, shall have any personal liability for obligations entered on behalf of Owner.

**SECTION 15.1.4** If one of the reasons described in Sections 15.1.1 and 15.1.2 exist, Contractor may, without prejudice to any other rights and remedies it might have, after fifteen (15) Business Days written notice to Owner, terminate the Contract and recover from Owner payment for Work executed in accordance with the Contract Documents up to the effective date of the termination of the Contract and proven losses with respect to, materials, equipment, tools, and construction equipment and machinery, and other costs to be reimbursed pursuant to Article 5 of the Agreement, including the reasonable direct costs actually incurred by Contractor in preserving and protecting the Work previously performed and the Project Site until Owner takes possession of the Project Site or assumes responsibility for such protection. Owner may deduct from any payment under this Section 15.1.4 any amounts Owner is authorized to deduct pursuant to the Contract Documents. In no event shall Contractor have a claim for damages, whether direct or consequential, lost profits, or additional compensation of any nature on account of the termination of the Contract.

**SECTION 15.1.5** Contractor shall have no right to terminate the Contract based upon any default unless (a) Contractor has given Owner the written notice specifying the default, and (b) Owner has failed to cure or reasonably commence and pursue a cure of the default within fifteen (15) Business Days after receiving the requisite written notice. If Owner cures, Contractor's notice of termination will be rendered ineffective, and the Contract will continue in full force and effect as if the reason for Contractor's termination had not occurred.

## **SECTION 15.2 TERMINATION BY OWNER FOR CAUSE**

**SECTION 15.2.1** Owner may terminate the Contract if Contractor:

(a) fails to commence the Work in accordance with the provisions of the Contract Documents;

(b) fails persistently or repeatedly prosecute the Work to completion in an efficient, timely, workmanlike, skillful and careful manner and in strict accordance with the provisions of the Contract Documents, including the Contract Time;

(c) fails to use an adequate number or appropriate quality of personnel, materials, or equipment to complete the Work;

(d) fails to comply with any of the material terms, provisions, or conditions of the Contract Documents;

(e) fails to make timely payments to Contractor's Subcontractors, Mechanics, Suppliers or laborers except if Owner has withheld payment in accordance with the Contract Documents;

(f) is in material breach of any other contract entered into between Owner or any of its Affiliates and Contractor,

(g) persistently disregards the Applicable Laws, or Governing Authorities; or

(h) permits or causes any of insolvency or change of ownership which includes but is not limited to any of the following occurrences:

(i) the filing of a petition for relief under the Bankruptcy Code or the institution of any other insolvency proceedings by, against, or on behalf of Contractor;

(ii) the appointment of a receiver for Contractor;

(iii) any act of insolvency by Contractor;

(iv) the death, dissolution or liquidation of Contractor;

(v) Contractor causing or permitting a general assignment for the benefit of Contractor's creditors; or

(vi) the transfer to others of more than twenty-five (25%) of the assets of or direct or indirect ownership interest of Contractor except to the extent agreed to in writing by Owner.

**SECTION 15.2.2** When any of the enumerated reasons in Section 15.2.1 (a) through (g) exist, Owner will send Contractor a Notice of Default setting forth the nature and extent of the alleged default and, if not otherwise self-evident, the actions necessary to cure the alleged default. Contractor shall, within five (5) Business Days after its receipt of such Notice of Default notify Owner in writing specifically addressing such Notice of Default whether Contractor intends to cure the alleged default and, if so, what actions Contractor intends to take to cure the alleged default and the timing thereof. If Contractor alleges that Contractor is not in default as alleged by Owner, or fails to respond timely to the Notice of Default, or fails immediately to remedy any default after receipt of the Notice of Default (or, if the default is not capable of being cured immediately, fails immediately to commence necessary actions to remedy such default and thereafter to prosecute such cure diligently to completion in accordance with Contractor's response), Owner shall be entitled to exercise any one or more of the remedies set forth in Section 15.2.4, below, all of which are cumulative and none of which shall be deemed exclusive of the other. In no event shall Contractor's cure of the default be completed more than forty-five (45) days after the delivery to Owner of Contractor's written response to Owner's Notice of Default.

**SECTION 15.2.3** When any of the enumerated reasons in Section 15.2.1(h) Owner may terminate the Contract by giving ten (10) Business Days' notice to Contractor, its trustee and its surety, if any, unless Contractor, the surety or its trustee: (1) promptly cures or takes action to cure all defaults of Contractor; (2) provides Owner adequate assurance, in form and substance satisfactory to Owner, in Owner's absolute discretion, of Contractor's ability to perform Contractor's continuing obligations under the Contract Documents; (3) makes Owner whole for all loss suffered by Owner as a result of



Contractor's default; and (4) assumes all obligations of Contractor within statutory time limits. If Contractor is not performing pursuant to the Construction Schedule at the time of the entry of an order for relief, or subsequent thereto, Owner, while awaiting the decision of Contractor, its trustee or surety to reject or to accept the Contract and provide adequate assurance of Contractor's ability to perform hereunder, may avail itself of such remedies granted Owner under the Contract Documents as are reasonably necessary to maintain the Construction Schedule, it being understood that such action will be beneficial to Contractor because of such action's mitigating effect on damages that Contractor would otherwise incur.

**SECTION 15.2.4** The remedies available to Owner are as follows:

(a) terminate the Contract in writing ("**Default Termination Notice**") with respect to all of or any portion of the Work without liability to Contractor for any Work thereafter performed by another contractor or anyone else;

(b) pursue any other right or remedy provided Owner elsewhere in the Contract, including, without limitation, the right to require Contractor to assign any and all subcontracts to Owner or such other party as Owner may designate in writing, and to require Contractor to take all actions and execute all documents deemed necessary or desirable by Owner to effect such assignments of the enumerated subcontracts;

(c) withhold payment of any monies due Contractor until the default has been cured and a final accounting of Owner's costs and appropriate deductions have been made as permitted under the Contract;

(d) setoff the cost to complete the performance of the Work against monies due to Contractor under the Contract or any other contract between Owner or an Owner Affiliate, and Contractor or a Contractor's Affiliate, whether such contract shall be in effect prior or subsequent to the Contract, provided ten (10) days' advance written notice is given to Contractor of Owner's intent to exercise any such set off right with respect to any agreement other than the Contract;

(e) pay any sums to any such persons, firms, or other entities to whom Contractor shall be obligated and to charge such sums paid to the account of Contractor which sums so paid shall be deemed validly paid and incurred by Owner unless proven by Contractor to be unreasonable in amount in light of all the circumstances, including, without limitation, that Contractor is in default of its contractual obligations. If the amount paid by Owner is greater than the amount then due Contractor, the excess shall be a debt due from Contractor to Owner and shall bear interest at the Stipulated Interest Rate;

(f) complete the Work or any portion thereof or correct any failures in the Work and procure such equipment, labor, tools, supplies, supervision, construction plant, materials and other incidentals necessary therefore, and in so doing use any of Contractor's equipment, tools, supplies, construction plant, materials and other incidentals, and consume materials on the Project Site until the Work is completed, and Contractor shall pay Owner the cost of such completion or correction, including but not limited to costs to compensate Owner for actual costs of mobilizing Owner's forces;

(g) recover from Contractor the reasonable value of all or a portion of the cost to complete the Work;

- (h) recover from Contractor all damages arising out of such default; or
- (i) any and all other remedies as may be provided at law or in equity.

**SECTION 15.2.5** Upon receipt of the Default Termination Notice, unless otherwise instructed by Owner, Contractor shall discontinue the Work as soon as safely practicable, and immediately discontinue the placing of orders for materials, facilities and supplies in connection with the performance of the Work. Contractor shall, as provided in the Default Termination Notice, either immediately terminate all existing subcontracts or take all actions and execute all documents deemed necessary or desirable by Owner to effect the assignment of all immediately discontinue prosecution of the Work and the ordering of materials, equipment, machinery and supplies in connection with the Contract and will, if requested make every reasonable effort to cancel all existing orders upon terms reasonably satisfactory to Owner. Unless otherwise instructed by Owner, Contractor will only do such Work as may be necessary to preserve and protect that portion of the work that has been incorporated into the site and to protect such materials, supplies and equipment at or around the Site or in transit thereto.

**SECTION 15.2.6** If Owner terminates Contractor's right to complete the Work or if Owner completes the Work or any portion thereof, Contractor shall receive no further payment (including any progress payment submitted to Owner but unpaid) until the Work is completed and accepted by Owner and by any Governing Authorities whose acceptance is required. Owner shall pay Contractor (i) the amount owing on the Contract Sum for the Work executed in accordance with the Contract Documents up to the effective date of the termination of the Contract, (ii) fair compensation either by purchase or rental at the election of Owner for any equipment owned by Contractor that Owner elects to retain and that is not otherwise included in the Cost of the Work and (iii) the cost to preserve and protect the Work already in progress and preserve and protect the material and equipment on and in transit to the Project Site, as proven; and (iv) together with, or less, all duly authorized and executed additive or deductive Change Orders, as applicable, less: (a) all costs incurred by Owner in completing the Work; (b) the additional costs; and (c) all fees for professional services by architects, engineers, consultants and experts incurred by Owner as a result of Contractor's default. However, the amount, if any, to be paid to Contractor shall not cause the GMP to be exceeded. If the unpaid amount due to Contractor is less than all sums allocable to Owner under the provisions of this Section 15.2.6, Contractor shall pay to Owner within thirty (30) days after Owner's invoicing Contractor for the amount by which Owner's cost exceed the unpaid balance due and such costs shall bear interest at the Stipulated Interest Rate from the date originally due under the terms of the Contract Documents until paid. Contractor hereby grants Owner a lien and security interest in all Contractor's tools, supplies, materials, equipment, appliances, and other incidentals taken possession of by Owner as is permitted by the Contract Documents, to secure the payment thereof including all costs to remedy any unauthorized change(s) to the Work.

If Owner elects to be assigned the subcontracts or other contracts or elects that Contractor assign the subcontracts or other contracts to any other party, Owner upon written request of such assignment(s) by Owner, Contractor shall take all actions, and execute all documents necessary to obtain effective assignments of such agreements as a condition precedent to receiving any payment under this Section 15.2.6.

**SECTION 15.2.7** If it is determined for any reason that Contractor was not in default or that its default was excusable or that Owner was not entitled to any remedy actually sought by Owner against Contractor as provided above, then the termination will be deemed to be a termination for Owner's convenience pursuant to Section 15.4 and Contractor's sole and exclusive remedies, whether in tort,

contract or otherwise, against Owner shall be the same as and shall be strictly limited to those afforded in Section 15.4.1.

### **SECTION 15.3 SUSPENSION BY OWNER FOR CONVENIENCE**

**SECTION 15.3.1** Owner may, without cause, order Contractor in writing to suspend, delay or interrupt the Work in whole or in part for such period of time as Owner may determine, as well as reschedule any portion of the Work affected by Owner's request to a time and date acceptable to Owner.

**SECTION 15.3.2** The postponement or rescheduling of the Work under Section 15.3 may be grounds for an extension of the Contract Time, if permitted under Section 9.2, and for an equitable adjustment in the Contract Sum if (i) the performance of the Work was properly scheduled by Contractor in compliance with the requirements of the Contract Documents, (ii) such rescheduling or postponement is required for the convenience of Owner, (iii) such rescheduling or postponement affects the critical path, and (iv) Contractor provides Owner with written notice of such effect within ten (10) Business Days after receipt of Owner's notice of the postponement or rescheduling. Owner shall not be responsible for any "impact claims" by Contractor or by any Subcontractor related to any postponement or rescheduling unless all of the conditions set forth in this Section 15.3.2 apply, and the notice requirement has been strictly followed.

### **SECTION 15.4 OWNER'S TERMINATION FOR CONVENIENCE**

**SECTION 15.4.1** Owner may at any time during the term of the Contract and for any reason terminate the Contract with respect to all of the Work or any portion thereof, at Owner's convenience. Termination for Owner's convenience shall be by service of a written notice from Owner to Contractor at least five (5) Business Days prior to the stated termination date ("Convenience Termination Notice").

**SECTION 15.4.2** Upon receipt of a Convenience Termination Notice from Owner, Contractor shall, unless the Convenience Termination Notice directs otherwise, discontinue the Work as soon as safely practicable, and immediately discontinue the placing of orders for materials, facilities and supplies in connection with the performance of the Work. Contractor shall, as provided in the Convenience Termination Notice, either immediately terminate all existing subcontracts or take all actions and execute all documents deemed necessary or desirable by Owner to effect the assignment of all subcontracts to Owner or such other party as Owner may designate in writing. Contractor shall, if required by Owner, make every reasonable effort to procure cancellation of all existing orders or contracts upon terms satisfactory to Owner, or, at the option of Owner, assign all orders, contracts and rights, including all benefits to be derived therefrom, to Owner. Contractor, as a condition to receiving any payment due Contractor upon termination pursuant to Section 15.4.3, shall execute any and all reasonable documents, instruments and agreements requested by Owner to effectuate any requested assignments. Unless otherwise instructed by Owner, Contractor will only do such Work as may be necessary to preserve and protect that portion of the work that has been incorporated into the site and to protect such materials, supplies and equipment at or around the site or in transit thereto.

**SECTION 15.4.3** In case of Termination for Convenience, Contractor shall be entitled to receive payment from Owner for Work executed in accordance with the Contract Documents up to the effective date of the termination of the Contract and proven loss with respect to, materials, equipment, tools, and construction equipment and machinery, including the reasonable direct costs actually

incurred by Contractor in preserving and protecting the Work previously performed and the Project Site until Owner takes possession of the Project Site or assumes responsibility for such protection. Owner may deduct from any payment under this Section 15.4.3 any amounts Owner is authorized to deduct pursuant to the Contract Documents. In no event shall Contractor have a claim for damages, whether direct or consequential, lost profits, or additional compensation of any nature on account of the termination of the Contract.

## **ARTICLE 16**

### **RESOLUTION OF CLAIMS AND DISPUTES**

#### **SECTION 16.1 PROCEDURE GOVERNING ALL DISPUTES**

All claims, disputes, disagreements, or controversies based upon, arising out of, directly or indirectly resulting from, relating to, in consequence of, or in any way involving the Contract, or the performance of the Work hereunder, or an actual or alleged breach thereof, shall be subject to this dispute resolution provision, unless specifically addressed in PLA or VDDA. In the event the PLA or VDDA contain alternative dispute resolution provisions that cannot be integrated with the provisions in this Article, the provisions of the PLA and VDDA take precedence. Owner, Subcontractor, Contractor, Architect and consultants and other parties concerned with the design or construction of the Project are bound each to the other by this dispute resolution clause, as long as the party has signed an agreement or any contract that incorporates the Contract by reference, or any subcontract or other agreement that requires it to be bound by this dispute resolution provision.

#### **SECTION 16.2 CONSTRUCTION CLAIMS STATUTE**

Pursuant to California Civil Code Section 895 et seq. (the "Construction Claims Statute") as hereafter amended, Owner, as a developer/builder has elected to use alternative contractual non-adversarial claims handling procedures for construction defect disputes in lieu of the statutory procedures contained in Sections 910 through 938 of the Construction Claims Statute. Accordingly, if, at any time during the entire term of the statute of limitations for construction defect claims, Owner provides Contractor with a copy of written notice of a claim for defects in the design or construction of the Project, arising out of or relating to the Work, from a homeowner, which notice shall include: (a) a description of the claimed defect; (b) the date on which the claimed defect was first discovered; and (c) the dates and times when the homeowner or the homeowner's agent will be available during ordinary business hours for service calls or inspections, Contractor shall reasonably cooperate with Owner to inspect the Work and, as requested by Owner, to repair the Work. To the extent that Owner engages in mediation with the homeowner, Contractor and other parties concerned with the design or construction of the Project are required to participate in the mediation in good faith, as long as the party has signed an agreement or any contract that incorporates these procedures or contains similar procedures, or any other subcontract or other agreement that requires it to be bound by this dispute resolution provision.

#### **SECTION 16.3 APPLICABILITY TO OTHER PARTIES**

Contractor covenants and agrees that it shall cause all Subcontractors, Mechanics, Suppliers or other persons performing any portion of the Work to acknowledge and be bound by all of the dispute resolution provisions in these General Conditions.

#### **SECTION 16.4 FEDERAL ARBITRATION ACT**

Owner and Contractor agree that all dispute resolution procedures in this Article 16 are governed by the Federal Arbitration Act. References to California law made herein shall not be construed as a waiver of any rights under the Federal Arbitration Act, or any rights to have such dispute resolution procedures interpreted and enforced under the Federal Arbitration Act.

#### **SECTION 16.5 VENUE**

If any court proceeding challenging the enforcement of the dispute resolution procedures herein is instituted (despite the provisions herein making that issue one to be resolved by the referee or arbitrator), the Parties agree that the exclusive jurisdiction and venue shall be the court in the county in California in which the Project is located, or in which Owner (or the division of Owner that owns the Project) has its principal place of business.

#### **SECTION 16.6 FINALITY OF AWARD**

The award rendered by the judicial referee or arbitrator shall be final (subject to appeal as allowed by law) and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.

#### **SECTION 16.7 NO WAIVER**

This Article 16 shall not be deemed a limitation of any rights or remedies which Contractor may have under any Federal or State mechanics' or design professionals' lien laws or under any applicable labor and material payment bonds unless such rights or remedies are expressly waived by it.

#### **SECTION 16.8 INFORMAL RESOLUTION AND MEDIATION OF CONTRACT DISPUTES.**

All disputes except those disputes initiated by a homebuyer against Owner or others who have performed Work or services at the Project and those disputes between Owner and Contractor for amounts paid by Owner or Contractor to resolve a homebuyer dispute shall be referred to as "Contract Disputes." Owner and Contractor agree to resolve all Contract Disputes in accordance with Sections 16.8.1 through 16.8.5.

**SECTION 16.8.1 Notice; Resolution of Contract Disputes.** Within ten (10) Business Days after notification of a Contract Dispute by Owner or Contractor to the other, representatives of Owner and Contractor, each with full authority to resolve the Contract Dispute, shall meet in person. If the parties resolve the Contract Dispute, in whole or in part, the Parties' respective representatives shall execute a written memorandum setting forth the substance of the Contract Dispute, the mutually-agreed resolution, or any portion thereof so resolved, and the actions to be taken by the Parties to implement the resolution. Such executed memorandum shall be conclusive evidence of the mutually-agreed resolution, which the Parties shall thereafter implement in accordance with the agreement.

**SECTION 16.8.2 Initiation of Mediation.** If the Parties do not resolve the entire Contract Dispute pursuant to the provisions of Section 16.8.1, prior to the initiation of any further dispute resolution proceedings, the Parties shall make a good faith effort to resolve the Contract Dispute by mediation. The Parties shall select one (1) mutually agreeable disinterested third party ("Mediator") with expertise in the development, design, and construction of similar for-sale residential projects

within ten (10) Business Days after the informal meeting of the Parties, and the Parties and the Mediator shall agree upon the dates, times, locations, and manner of proceeding with such process.

**SECTION 16.8.3 Procedures for Mediation.** The process, at a minimum, shall include the following requirements: At least two (2) Business Days prior to the initial mediation conference with the Mediator, each party shall submit a "position paper" setting forth the material bases for its respective position to the Mediator and the other parties. Each party shall also provide a brief verbal presentation to the Mediator and the other parties. The Mediator should identify areas of agreement and dispute, and establish, if possible, a range of likely outcomes for purposes of facilitating complete settlement of the Contract Dispute. The informal attempts to negotiate a settlement under Section 16.8.1 and the mediation shall be completed within sixty (60) days after the date of notification of the Contract Dispute to either Party. If the Contract Dispute is not resolved in its entirety within such sixty (60) day period, then either Party may, within fifteen (15) days after the expiration of the sixty (60) day period, commence judicial reference proceedings or, if judicial reference is not permitted, arbitration proceedings, pursuant to Sections 16.9 and 16.11, respectively.

**SECTION 16.8.4 Admissibility.** Nothing disclosed by any party or the Mediator may be admitted in any subsequent adjudicative process.

**SECTION 16.8.5 Condition Precedent.** Participation in the mediation is a condition precedent to the initiation of any adjudicative action or proceeding, including judicial reference or arbitration. Owner and Contractor shall include substantially identical dispute resolution procedures and provisions in all contracts that they enter into relative to the Project.

## **SECTION 16.9 JUDICIAL REFERENCE FOR ALL DISPUTES**

If (a) mediation is not successful in resolving the entire Contract Dispute or is not required by the terms of the Contract, or (b) a judicial reference proceeding is instituted under the terms of any Purchase Agreement and Deposit Receipt and Escrow Instructions executed by a property owner in the Project, then Owner and Contractor agree to submit any such dispute to judicial reference pursuant to California Civil Code Section 638 et seq. If a judicial reference proceeding is initiated based on any such dispute, the following shall apply:

**SECTION 16.9.1 Location of Proceeding.** The proceeding shall be brought and held in the county in which the Project is located, unless the parties agree to a different location.

**SECTION 16.9.2 Judicial Reference Procedure.** The parties shall use the procedures adopted by JAMS for judicial reference and selection of a referee (or any other entity offering judicial dispute resolution procedures as may be mutually acceptable to the parties).

**SECTION 16.9.3 Referee Choice.** The referee must be a retired judge or a licensed attorney with substantial experience in relevant real estate matters. The parties shall agree upon a single referee who shall have the power to try any and all of the issues raised, whether of fact or law, which may be pertinent to the matters in dispute, and to issue a statement of decision thereon. Any dispute regarding the selection of the referee shall be resolved by JAMS or the entity providing the reference services, or, if no entity is involved, by the court in accordance with California Code of Civil Procedure Sections 638 through 640.

**SECTION 16.9.4 Referee's Authority.** The referee may require one or more pre-hearing conferences. The referee shall have authority to provide all remedies available in law or equity

appropriate under the circumstances of the controversy. The referee shall have the authority to rule on all post-hearing motions in the same manner as a trial judge.

**SECTION 16.9.5 Discovery.** The parties shall be entitled to discovery, and the referee shall oversee discovery and may enforce all discovery orders in the same manner as any trial judge.

**SECTION 16.9.6 Record.** A stenographic record of the reference proceedings shall be made if required by under the Purchase Agreement or any contract of other parties that are required to participate in the judicial reference proceeding with Owner and Contractor. In such event, all parties shall share the costs of the stenographic record equally, unless by contract, such party is not required to share in the cost. If the judicial reference proceeding only involves Owner and Contractor and/or a Subcontractor or Sub-tier Subcontractor bound by these dispute resolution provisions, or recordation is not required by contract with any other parties required to participate in the reference proceedings, Owner, Contractor or others may request recordation of the proceedings with the cost borne solely by the requesting party.

**SECTION 16.9.7 Statement of Decision.** The referee's statement of decision shall contain findings of fact and conclusions of law to the extent applicable. The statement of decision shall be binding upon the parties, and upon filing of the statement of decision with the clerk of court, or with the judge where there is no clerk, and judgment may be entered thereon.

**SECTION 16.9.8 Appeal.** The decision of the referee shall be appealable as if rendered by the court.

**SECTION 16.9.9 Costs.** Each party to the judicial reference will bear its own attorney's fees. The costs of the judicial reference procedure will be split among the participating parties.


#### **SECTION 16.10 ARBITRATION PROCEEDINGS**

If the judicial reference procedures are legally unavailable or the parties agree, then the dispute will be submitted to binding arbitration. The dispute shall be administered in accordance with procedures established by the American Arbitration Association ("AAA"). For disputes that involve allegations of patent or latent construction defects, including defects in design or engineering, such disputes shall be administered in accordance with the Industry Arbitration Rules and AAA's Supplemental Procedures for Residential Construction Disputes in effect on the date of the submission of the claim to arbitration. If AAA is not then in existence, then the dispute shall be submitted to JAMS, and administered in accordance with either the Streamlined Arbitration Rules and Procedures, or (if applicable) the Comprehensive Arbitration Rules of JAMS.

#### SECTION 16.11 WAIVER OF RIGHT TO JURY TRIAL

AS TO ALL DISPUTES COVERED BY JUDICIAL REFERENCE AND ARBITRATION, THE PARTIES WAIVE ANY RIGHTS TO JURY TRIAL FOR SUCH DISPUTES. THE PARTIES MAKE THIS WAIVER KNOWINGLY, INTENTIONALLY, AND VOLUNTARILY, AND ACKNOWLEDGE THAT NO ONE HAS MADE ANY REPRESENTATION OF FACT TO INDUCE THEM TO MAKE THIS WAIVER OR IN ANY MANNER OR IN ANY WAY TO MODIFY OR NULLIFY ITS EFFECT. THE PARTIES FURTHER ACKNOWLEDGE THAT THEY HAVE HAD THE OPPORTUNITY TO BE ADVISED BY INDEPENDENT LEGAL COUNSEL IN CONNECTION WITH THIS CONTRACT AND IN MAKING THIS WAIVER. THE PARTIES FURTHER ACKNOWLEDGE, HAVING READ AND UNDERSTOOD THE MEANING AND RAMIFICATIONS OF THIS WAIVER, INTEND THAT THIS WAIVER BE CONSTRUED AS BROADLY AS POSSIBLE EXTEND TO ALL DISPUTES COVERED BY THIS CONTRACT.

  
OWNER'S INITIALS

  
CONTRACTOR'S INITIALS

#### SECTION 16.12 THIRD—PARTY DISPUTES

If any dispute involves parties other than Owner, Contractor, or others bound by these disputes resolution procedures, this Article 16 shall be interpreted to require joinder of those third parties into the dispute resolution procedure prescribed herein to the fullest extent permitted by law. All parties shall cooperate in good faith to ensure that all necessary and appropriate parties are included in the dispute resolution proceeding. If a third party brings an action or proceeding, including any alternative dispute resolution proceeding (the "Third-Party Action") against Owner and it is not legally permissible to bring the third party into the dispute resolution procedure provided herein, Owner may, in its sole and absolute discretion, elect any one of the following options:

- (a) Implement a standstill arrangement pursuant to which Contractor shall be bound and all proceedings herein shall thereafter be stayed, all statutes of limitations tolled, and all rights, as between Owner or Contractor involved in the dispute are preserved pending the outcome of the Third-Party Action;
- (b) Join Contractor in the Third-Party Action to the fullest extent permitted by law, without regard to the procedural requirements established herein, and therefore resolve all disputes with Contractor relating to the Third-Party Action; or
- (c) Proceed independently of the Third-Party Action to resolve all disputes of any nature, including those relating to any claims or controversies affecting Contractor being litigated in the Third-Party Action in accordance with the procedures set forth herein.